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No. D

00-363

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In The  
**Supreme Court of the United States**

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OMAR STRATMAN,

*Petitioner,*

v.

DIRK KEMPTHORNE,  
SECRETARY OF THE INTERIOR;  
LEISNOI, INC.;  
KONIAG, INC.,

*Respondents.*

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On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTION PRESENTED

Petitioner brought action against the Secretary of Interior for review of his determination that Respondent Leisnoi, Inc. was qualified to receive land and benefits under the Alaska Native Claims Settlement Act (ANCSA) as an eligible "Native village." On remand, the Interior Board of Land Appeals (IBLA) determined that Leisnoi was not, in fact, qualified for eligibility as a Native village. On appeal, the Ninth Circuit held that the Petitioner's action had been mooted by Congress' enactment of Section 1427 of the Alaska National Interest Lands Conservation Act (ANILCA). Section 1427 amended ANCSA's provisions as to certain Native villages, and listed Leisnoi as one of the affected "village corporations." The Ninth Circuit held that the listing of Leisnoi as a "village corporation" constituted a congressional determination of its eligibility, and exempted Leisnoi from having to satisfy ANCSA's village eligibility requirements. The court based its interpretation on the "plain language" of this provision, and refused to consider Section 1427's legislative history, which showed that Congress had listed Leisnoi as a "village corporation" in the mistaken belief that the Secretary's determination of its eligibility had already become final, and that Leisnoi had already been determined to have satisfied ANCSA's eligibility requirements.

The question presented is:

Whether the Ninth Circuit impermissibly invalidated a prior congressional enactment by failing to apply the canons of statutory construction relating to repeals by implication, and by construing the “plain language” of ANILCA Section 1427 as exempting Leisnoi from ANCSA’s village eligibility provisions, and mooting the Petitioner’s action, without regard to Section 1427’s legislative history, and contrary to Congress’ actual intent.

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## **OPINIONS BELOW**

The opinion of the court of appeals is reported at 545 F.3d 1161, and is reprinted in the Appendix as Pet. App. A. The opinion of the district court is unreported, and is attached as Pet. App. B. The opinion of the Secretary of Interior is unreported, and is attached as Pet. App. C. The opinion of the Interior Board of Land Appeals is reported at 157 IBLA 302, and is attached as Pet. App. D. The opinion of the Administrative Law Judge is unreported, and is attached as Pet. App. E.

## **JURISDICTION**

The judgment of the court of appeals was entered on October 6, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## **STATUTORY PROVISIONS INVOLVED**

This case involves provisions of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 *et seq.*, and regulations adopted by the Secretary, 43 CFR § 2651.2. It also involves provisions of the Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371. The pertinent provisions are reproduced in Pet. App. H.

## STATEMENT

This case involves an action against the Secretary of Interior for review of his determination, made under the Alaska Native Claims Settlement Act (ANCSA), that Respondent Leisnoi, Inc. was eligible to participate in ANCSA, and to receive public lands and other ANCSA settlement benefits, as a "Native village." The district court had initially dismissed the action, based on the Petitioner's failure to exhaust his administrative remedies. On appeal, the Ninth Circuit reversed the district court and vacated the judgment of dismissal, holding that the Petitioner was excused for his failure to exhaust because he had been entitled to, but did not receive, actual notice of the DOI's proceedings. The case was remanded to the district court, which then remanded the case to the Interior Board of Land Appeals (IBLA) for a re-determination of Leisnoi's eligibility, after conducting a new evidentiary hearing.

While the case was pending on appeal to the Ninth Circuit, and during the period of its dismissal by the district court, Congress enacted Section 1427 of the Alaska National Interest Lands Conservation Act (ANILCA). Section 1427 amended ANCSA's land selection and entitlement provisions with respect to the Native village corporations located in

the region of Kodiak, Alaska.<sup>1</sup> Section 1427(a)(4) listed the Native village corporations that were subject to the amended provisions, which included Leisnoi. The Respondents argued, in the district court, that by listing Leisnoi as a “village corporation,” Section 1427 “ratified” Leisnoi’s status as an eligible Native village, and mooted the Petitioner’s action. The legislative history of Section 1427 shows that when Congress enacted Section 1427, it had not been aware of the existence of the Petitioner’s action, and mistakenly believed that Leisnoi had already been determined to have satisfied ANCSA’s village eligibility requirements in a final and unchallenged determination made by the Secretary.

The district court deferred ruling on the ANILCA Section 1427 issue, and instead remanded it to the IBLA for its initial determination, along with its re-determination of Leisnoi’s eligibility. On remand, the IBLA determined that Leisnoi was not, in fact, qualified for eligibility under ANCSA as a Native village. The IBLA also determined that ANILCA Section 1427 had not ratified Leisnoi’s status as an eligible Native village, or mooted the Petitioner’s action. After invoking personal authority to reconsider the IBLA’s decision, the

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<sup>1</sup> ANCSA divided the state of Alaska into twelve “regions.” 43 U.S.C. § 1606(a). The region for Kodiak is known as the “Koniag region,” and the name of the regional corporation is “Koniag, Inc.”

Secretary of Interior rejected the IBLA's interpretation, and determined that Section 1427 was "best interpreted" as having "ratified" Leisnoi's eligibility and as mooted the Petitioner's challenge. The district court upheld the Secretary's interpretation of Section 1427 as reasonable, under the doctrine of *Chevron U.S.A. v. Natural Resource Defense Council*, 467 U.S. 837 (1984), and dismissed the Petitioner's action as moot. On appeal, the Ninth Circuit applied a *de novo* standard of review, but independently interpreted Section 1427 as having mooted the Petitioner's action. The Court based its interpretation on the "plain meaning" of Section 1427, and concluded that the listing of Leisnoi as a "village corporation" constituted "a Congressional determination that Leisnoi is a village corporation [that] exempts Leisnoi from having to satisfy ANCSA's eligibility requirements." Pet. App. A-20. The Court denied that its interpretation involved the partial repeal of ANCSA's village eligibility requirements, or that its interpretation was governed by the rules of statutory construction relating to repeals by implication. Pet. App. A-28. The Court also "declined" to examine the legislative history of Section 1427, finding it unnecessary "to further clarify a matter of interpretation resolved on the face of the statute." Pet. App. A-28 n. 5.

## A. Background

This is the last remaining case in a scandal that dates back 35 years, and relates to the submission of fraudulent applications on behalf of eight alleged "villages" located in the region of Kodiak, Alaska, seeking a determination of their eligibility to receive public lands and other settlement benefits under ANCSA as "Native villages." These applications were submitted in a scheme to inflate the amount of land and ANCSA benefits that Natives residing in and around the city of Kodiak stood to receive, by creating a number of phantom "villages" in and around the island of Kodiak that would each be entitled to separate grants of ANCSA lands and benefits. Various sites were selected as being the site of each "village." These included a fish processing plant, a Forest Service recreational site, and in the case of Respondent Leisnoi, Inc., a federally-owned housing complex for FAA employees and a children's summer camp. Natives residing in the city of Kodiak, and elsewhere, were solicited (and misled) into enrolling to these "villages" as the place of their permanent residence, and were then listed as being the villages' "residents." The applications were also supported by false affidavits from individuals attesting to their use of the "village" as a place where they actually lived. This scheme became a national scandal when it was investigated and reported in a series of articles by national syndicated columnist

Jack Anderson.<sup>2</sup> It was also the subject of congressional hearings conducted by the House Subcommittee on Merchant Marine and Fisheries, chaired by Representative John Dingell. *Alaska Native Claims, Hearings Before the Subcomm. On Fisheries and Wildlife Conservation and the Environment of the Comm. On Merchant Marine and Fisheries*, 93d Cong., 2d Sess. (1975).

All eight of these alleged villages had been initially investigated and determined by the BIA to be qualified for eligibility under ANCSA as "Native villages." In accordance with the Secretary's regulations, the BIA's initial determinations of eligibility for seven of the eight villages were

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2 These included the following articles:

- 1) Jack Anderson, *Land-Grab Scheme Bared in Alaska*, WASHINGTON POST, Feb. 21, 1979; 2) Jack Anderson, *Those "Phantom" Villages in Alaska*, WASHINGTON POST, Feb. 22, 1979; 3) Jack Anderson, *Phantom Villages Grab for Woodland*, WASHINGTON POST, Feb. 23, 1979; 4) Jack Anderson, *Alaska Land Grab Charged*, SEATTLE POST INTELLIGENCE, Feb. 23, 1979; 5) Jack Anderson, *Man Behind Alaska Land Grab*, TACOMA NEWS TRIBUNE, Feb. 23, 1979; 6) Jack Anderson, *Bill Abets Alaska Land Swindle*, TACOMA NEWS TRIBUNE, Feb. 23, 1979; 7) Jack Anderson, *U.S. Drops Land Case Prosecution*, WASHINGTON POST, Mar. 1, 1979; 8) Jack Anderson, *Fraud is in the Eye of the Beholder*, ANCHORAGE DAILY NEWS, Mar. 1, 1979; 9) Jack Anderson, *Alaska Land Charge Reiterated*, WASHINGTON POST, April 21, 1979.

subsequently protested and appealed by "interested parties," and following separate hearings, all seven were ultimately determined to be not qualified for eligibility as a "Native village." The eighth remaining, and unchallenged, village was Leisnoi.<sup>3</sup> Unlike the other seven alleged villages, the BIA's initial determination of Leisnoi's eligibility had not been similarly protested in the administrative proceedings, and was allowed to become final when it was adopted and approved by the Secretary. Following the approval of its eligibility, Leisnoi became entitled under ANCSA to the conveyance of 115,200 acres of public lands, based on the number of persons who had enrolled to it as the place of their permanent residence.

1. *ANCSA's village eligibility provisions.* Congress enacted ANCSA in 1971 to settle the aboriginal land claims of the Alaskan Natives. 43 U.S.C. § 1603. In exchange for the extinction of all claims of aboriginal title, Alaskan Natives were to receive approximately forty-four million acres of land and nearly \$1 billion in federal funds. Among other things, ANCSA provided for the direct distribution of lands and benefits to qualified "Native villages," which were to be incorporated as Native "village corporations." ANCSA specified the

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<sup>3</sup> "Leisnoi, Inc." is the name of the village corporation that was formed for the "Village of Woody Island," which was the name of the alleged "Native village."

criteria for determining whether an entity qualified for eligibility as a “Native village,” and required the Secretary to make individual findings, for each Native village, that it satisfied the criteria for eligibility. 43 U.S.C. 1602(c), 1610(b). Section 11(b)(1) of ANCSA listed a number of villages that were presumptively eligible as Native villages (“listed villages”), subject to the subsequent determination of their eligibility by the Secretary. 43 U.S.C. 1610(b)(1). Villages that were not listed in Section 11(b)(1) (“unlisted villages”) could apply to the Secretary for certification of their eligibility pursuant to subsection 11(b)(3), provided they satisfied the criteria for eligibility. 43 U.S.C. § 1610(b)(3).

The Secretary adopted regulations to establish the procedure for determining the eligibility of unlisted villages. 43 CFR 2651.2(a)(6). The regulations provided for the filing of an application on behalf of an unlisted village with the Director of the Juneau Area Office of the Bureau of Indian Affairs (the “BIA Area Director”). 43 CFR 2651.2(a)(6). The BIA Area Director was to investigate the application and make an initial determination of the village’s eligibility. 43 CFR 2651.2(a)(8). His decision was to be published in the Federal Register and one or more newspapers of general circulations. “Interested parties” could protest his decision within 30 days from the date of publication. 43 CFR 2651.2(a)(9). If no protest was received, his determination was to become final, and his decision and the record certified to the

Secretary. 43 CFR 2651.2(a)(6). If a protest was received, the BIA Area Director was to review the protest and supporting evidence, and make a new determination of the village's eligibility. 43 CFR 2651.2(a)(4) & (a)(10). His decision was to be published, and become final unless appealed to the IBLA within 30 days of the date of publication. *Id.*

ANCSA directed the Secretary to make all village eligibility determinations "within two and one-half years" from the date of ANCSA's enactment (December 18, 1971). 43 U.S.C. § 1610(b)(2) & (b)(3). However, on June 10, 1974, the Secretary issued Secretarial Order No. 2965, which concluded that this deadline was directory rather than mandatory, and directed the Department to continue its adjudication of all pending village eligibility appeals. Pet. App. F. The order recited that "it has been decided to provide an opportunity for a full hearing to all parties in all disputes now or hereafter pending before the Alaska Native Claims Appeals Board concerning Native Village eligibility," and that "[t]his decision has been made in order to provide all parties due process of law and in order to develop a complete record so that the final secretarial determination of Native Village eligibility will be as correct, fair and just as possible." *Id.* The order stated that it superseded any inconsistent provisions in the Department's regulations. *Id.*

On December 2, 1980, Congress amended ANCSA to establish a two-year statute of limitations for bringing actions for judicial review of

the decisions made by the Secretary under ANCSA. 43 U.S.C. § 1632. The statute required such actions to be brought "within two years after the day the Secretary's decision becomes final or December 2, 1980, whichever is later." *Id.*

2. *Petitioner's action against the Secretary.* The Secretary adopted and approved the BIA Area Director's initial determination of Leisnoi's eligibility, and certified Leisnoi as an eligible Native village, on September 9, 1974. After learning that an application for an alleged Native village on Woody Island had been submitted and approved by the Secretary, a group of concerned citizens in Kodiak formed an ad hoc "Citizens Action Group" to challenge the determination of Leisnoi's eligibility. On June 2, 1976, they filed action against the Secretary to set aside his determination of Leisnoi's eligibility, and to enjoin the conveyance of any public lands or other ANCSA benefits to Leisnoi. The district court dismissed the action for failure of the plaintiffs to exhaust their administrative remedies, and for lack of standing. On appeal, the Ninth Circuit upheld the dismissal as to all but two of the plaintiffs. The court excused the Petitioner and another plaintiff for their failure to exhaust because they were cattle ranchers who had held federal grazing leases on lands subject to selection and conveyance to Leisnoi, and had been entitled to actual notice of the Department's proceedings regarding Leisnoi's application for eligibility. *Stratman v. Watt*, 656 F.2d 1321, 1325-1326 (9<sup>th</sup> Cir.1981), cert. dismissed, 456 U.S. 901

(1982). In 1982, following the issuance of the Ninth Circuit's decision in *Watt*, the parties entered into a settlement agreement under which the action was voluntarily dismissed. However, the action was subsequently re-opened in 1995, following Leisnoi's repudiation of the settlement agreement.

On September 13, 1995, the district court entered an order remanding the case to the IBLA to conduct a new evidentiary hearing to re-determine Leisnoi's eligibility. The district court also remanded to the IBLA, for its initial determination, the issue of whether ANILCA Section 1427 had ratified Leisnoi's status as an eligible Native village and mooted the Petitioner's challenge. The court stated that "[t]his is a difficult question that should be decided in the first instance by the agency."

3. *ANILCA Section 1427.* The Alaska National Interest Lands Conservation Act (ANILCA) was enacted by Congress on December 2, 1980. Pub.L.No. 96-487, 94 Stat. 2371. Section 1427 is contained in Title XIV of ANILCA, entitled "Amendments to the Alaska Native Claims Settlement Act and Related Provisions." 94 Stat. 2518. The primary purpose of Section 1427 was to amend ANCSA's land selection and entitlement provisions, to provide for the exchange and substitution of "deficiency lands" that had been withdrawn on the Alaska Peninsula for selection by Native village corporations in the Koniag region under ANCSA's original land selection and entitlement provisions, for other specified lands on Afognak Island. Section 1427(a)(4) listed the

Native village corporations that were subject to the land exchange, which were defined as "Koniag deficiency village corporations," and which included Leisnoi.

A second purpose of Section 1427 was to settle the village eligibility litigation that had been brought against the Secretary by the seven alleged "villages" in the Kodiak region that had been determined to be ineligible. Following the determinations of their ineligibility, the "villages" brought suit against the Secretary to overturn their eligibility determinations. See *Koniag, Inc. v. Kleppe*, 405 F.Supp. 1360 (D.D.C.1975), aff'd in part and rev'd in part, 580 F.2d 601 (D.C.Cir. 1978), cert denied, 439 U.S. 1052 (1978). The Court of Appeals ultimately vacated the Secretary's determinations of their ineligibility, and remanded their cases back to the Secretary to re-determine their eligibility, due to perceived intervention in the original administrative proceedings by Congressman John Dingell, who chaired the Congressional subcommittee that had investigated the alleged villages' applications for eligibility.<sup>4</sup> *Koniag, Inc. v.*

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4 The district court noted that the Committee had been extremely critical of the DOI's investigation and procedures for determining the villages' eligibility, and that Chairman Dingell made a "strenuous effort . . . to encourage protest and appeals" of the BIA Director's initial determinations of their eligibility. *Koniag, Inc. v. Kleppe*, 405 F.Supp. at 1371-72.

*Andrus*, 580 F.2d at 610-11. Section 1427 settled this litigation by according the seven alleged villages limited eligibility status in return for their acceptance of a small fraction of the land to which they would have otherwise been entitled under ANCSA. Section 1427(e) provided that each of the seven uncertified villages “shall be deemed an eligible village under the Alaska Native Claims Settlement Act,” and become entitled to a fractional share of the exchanged lands on Afognak Island, provided they filed a release with the Secretary “from all claim” to any lands or benefits under ANCSA. *Id.*

The legislative history of Section 1427 reveals that it was drafted by counsel for Koniag, Inc., Ed Weinberg, following negotiations between Koniag and the DOI. Pet. App. G-1; G-5. Mr. Weinberg served as counsel for the seven uncertified villages in their litigation against the Secretary in *Koniag, Inc. v. Kleppe*. At the time, Mr. Weinberg was also serving as counsel for Leisnoi in the Petitioner’s action against the Secretary for review of his determination of Leisnoi’s eligibility. At that point, however, the Petitioner’s action had been dismissed by the district court, and was on appeal to the Ninth Circuit, in the period prior to the issuance of the Ninth Circuit’s decision vacating the district court’s judgment of dismissal, in *Stratman v. Watt*, 656 F.2d 1321 (9<sup>th</sup> Cir. 1981). Mr. Weinberg prepared a Statement and a section-by-section analysis of Section 1427, denominated as “the Koniag Amendment,” which he presented to

Congress in hearings before the House Committee on Interior and Insular Affairs. Pet. App. G. His section-by-section analysis was adopted verbatim, and appears in the official legislative history in the Senate Report issued on H.R. 39 (ANILCA) by the Senate Committee on Energy and Natural Resources.<sup>5</sup>

Mr. Weinberg's prepared statement addressed the two primary purposes of the Koniag Amendment. First, it explained that the amendment would solve the problem of the lack of sufficient lands in the Kodiak area to satisfy the land entitlements for the Koniag villages and regional corporation. Pet. App. G-2 to G-3. Secondly, the statement explained that "[a] second element of Koniag's land problem is the village eligibility litigation . . .", and declared that "[s]even Koniag villages are involved." Pet. App. G-3 (emphasis added). The statement concluded that the Amendment would "resolve, in a mutually satisfactory manner, a long standing dispute concerning the eligibility of *seven* Koniag villages for benefits under the Alaska Native Claims Settlement Act in a manner which imposes no substantial additional land burden upon the United States." Pet. App. G-9 (emphasis added).

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<sup>5</sup> Senate Comm. On Energy And Natural Resources, Alaska National Interest Lands Conservation Act, S. Rep. No. 96-413, 96<sup>th</sup> Cong., 2d Sess. 323-326 (1980), reprinted in 1980 U.S.C.C.A.N. 5267-5270.

The statement and section-by-section analysis prepared by Mr. Weinberg never advised Congress that Leisnoi was also involved in “village eligibility litigation,” and that the Secretary’s determination of its eligibility had been challenged, and was the subject of a pending action for judicial review. This fact was never disclosed by Mr. Weinberg, ostensibly because he believed that the district court’s judgment of dismissal of the Petitioner’s action would be ultimately upheld on appeal by the Ninth Circuit. Instead, Leisnoi was simply listed as one of the villages subject to the Amendment’s land exchange provisions, along with the other villages in the Koniag region whose eligibility had not been challenged, and that had already been determined to be eligible in final decisions made under ANCSA.

## **B. The remanded agency proceedings**

1. *The IBLA’s decision.* On remand from the district court, the IBLA referred the matter to the Hearings Division, to conduct an evidentiary hearing to determine whether Leisnoi satisfied ANCSA’s criteria for eligibility as an unlisted Native village. The case was assigned to Administrative Law Judge Harvey C. Sweitzer, who presided over a two-week hearing in the cities of Anchorage and Kodiak, Alaska in August 1998. On October 13, 1999, Judge Sweitzer issued a 100-page Recommended Decision finding that Leisnoi did not satisfy ANCSA’s criteria for eligibility as an unlisted Native village, and recommending that

Leisnoi be certified as not eligible for ANCSA benefits.<sup>6</sup> Pet. App. E.

Among other things, the evidence adduced at the hearing showed that the same BIA investigator who had investigated Leisnoi's application for eligibility had also investigated the other seven alleged villages in the Koniag region, and had similarly recommended that they be found to be eligible. The ALJ found that the BIA's investigation of Leisnoi's application had been "cursory," and that the BIA investigator's report was "misleading" and "of little probative value." Pet. App. E-69 to E-70. The ALJ found that the investigator had improperly attributed FAA buildings, facilities, and non-Native employees as being the facilities and residents of the alleged "village." Pet. App. E-66 to E-70. The ALJ also found that the affidavits that had been submitted in support of Leisnoi's application for eligibility were "misleading or false," and that "nearly all of the

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6 The ALJ found that Leisnoi failed to satisfy the statutory and regulatory criteria for village eligibility, in that: 1) Leisnoi did not have 25 or more Native residents on April 1, 1970; 2) Leisnoi was not an established Native village on April 1, 1970 and did not have an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and life-style; and 3) less than 13 of the Natives enrolled to Leisnoi used the alleged village during 1970 as a place where they actually lived for a period of time. Pet. App. E-232 to E-233.

Natives enrolled to Woody Island were not residents in 1970.” Pet. App. E-70. The ALJ concluded that, on April 1, 1970, “the island lacked a Native village.” Id.

On October 29, 2002, the IBLA issued a published decision, which adopted the ALJ’s recommended decision.<sup>7</sup> 157 I.B.L.A. 302 (2002); Pet. App. D. The IBLA’s decision also addressed the remanded issue of whether ANILCA Section 1427 had ratified Leisnoi’s status as an eligible Native village and mooted the Petitioner’s challenge. The IBLA determined that Section 1427 had not ratified Leisnoi’s eligibility, or mooted the Petitioner’s action. The IBLA concluded that the listing of Leisnoi as a “village corporation” in Section 1427(a)(4) and its entitlement to lands on Afognak Island “was not a ratification of its eligibility as a Native village.” Pet. App. D-29. The IBLA noted that, at the time Congress enacted Section 1427, Leisnoi’s status as an eligible Native village had already been established by a “final decision by the Secretary of the Interior that Woody Island, in fact, satisfied the ANCSA requirements

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<sup>7</sup> IBLA noted that the ALJ’s decision constituted a comprehensive and exhaustive analysis of the evidence, which included “over 3,600 pages of transcript of the testimony of over 40 witnesses; depositions, affidavits, and interviews from over 50 witnesses; over 600 exhibits, totaling thousands of pages, and over a thousand pages of post-hearing briefing.” Pet. App. D-42.

for status as a Native village,” and concluded that the listing of Leisnoi in Section 1427(a)(4) “was merely reflective of that status.” *Id.* The IBLA further noted that, at the time, the Petitioner’s action had been dismissed by the district court, and that the Secretary’s determination of Leisnoi’s eligibility “was in effect, and not the subject of an immediate judicial challenge.” *Id.* The IBLA stated that its conclusion that “it was not the intention of Congress to moot any lawsuit regarding Leisnoi’s eligibility” by listing Leisnoi in Section 1427(a)(4) was “reinforced by the fact that in the same section Congress expressly provided for the resolution of disputes concerning the status of seven unlisted villages by declaring them each to be ‘deemed an eligible village under the Alaska Native Claims Settlement Act.’ . . . It could have done the same for Leisnoi, but it did not.” Pet. App. D-30.

2. *The Secretary’s decision.* Following the issuance of the IBLA’s decision, Leisnoi sent a request to the Secretary to personally assume jurisdiction and reconsider and reverse the IBLA’s decision. Although the matter had been remanded specifically to the IBLA, the district court stayed any further judicial proceedings until after the Secretary acted on Leisnoi’s request. Four years later, on December 20, 2006, the Secretary issued a single-sentence decision that adopted the analysis and conclusions of a memorandum prepared by the Office of the Solicitor, authored by Deputy Solicitor Lawrence J. Jensen. Pet. App. C-2; C-4. In his memorandum, the Deputy Solicitor rejected the

IBLA's analysis, and concluded that ANILCA Section 1427 had ratified Leisnoi's eligibility and mooted the Petitioner's action. The Deputy Solicitor acknowledged that it was unclear whether Section 1427 had been intended to ratify Leisnoi's status and moot the Petitioner's action, and although it could be read either way, he concluded that the "better reading" of Section 1427 was to interpret it as having ratified Leisnoi's status and as mooting the Petitioner's challenge. Pet. App. C-26. The Deputy Solicitor reasoned that this construction of Section 1427 furthered its ostensible purpose, which was "to settle with finality and 'as soon as practicable' the land entitlements of Koniag Regional Corporation and its villages . . .". *Id.* In view of this purpose, he stated that it is "reasonable to conclude that Congress intended to resolve all of the uncertainties and did not intend to leave the parties at risk of having their entitlements upset by a judicial resolution of Stratman's challenge to Leisnoi's eligibility." Pet. App. C-19 to C-20. The Deputy Solicitor concluded that "[r]eading section 1427 as a whole, and in the absence of any clear evidence to the contrary, I conclude that the language in subsections (b)(1) and (a)(2) is best read as ratifying the Secretary's eligibility determination with respect to Leisnoi." Pet. App. C-27.

### **C. The district court proceedings**

On September 26, 2007, the district court issued a decision upholding the Secretary's interpretation

of Section 1427, and dismissing the Petitioner's action as moot. Pet. App. B. The court held that the Secretary's interpretation of Section 1427 was entitled to *Chevron* deference. Pet. App. B-11 to B-17. The court found that Section 1427 was "ambiguous" as to whether Congress intended to ratify Leisnoi's eligibility, and that the Secretary's interpretation was "reasonable." Pet. App. B-14 to B-15. The court agreed with the Secretary's analysis and conclusion that ratification of Leisnoi's eligibility furthered Section 1427's purpose "of settling Koniag's land entitlement quickly and permanently." Pet. App. B-16. The court held that Section 1427 mooted the Petitioner's action, concluding that, by enacting Section 1427, "Congress effectively decided to overlook any doubts as to Leisnoi's eligibility or shortcomings in the Secretary's 1974 determination in order to settle the land selection process in the Koniag region with finality." Pet. App. B-17.

#### **D. The Ninth Circuit's decision**

On appeal, the Ninth Circuit applied a *de novo* standard of review, but independently interpreted Section 1427 as having "ratified" the Secretary's determination of Leisnoi's eligibility, and as mooting the Petitioner's action. Pet. App. A. The Court based its interpretation on the "plain language" of Section 1427, and applied the rule of statutory construction that a statute must be construed in accordance with its "plain and

unambiguous meaning.” Pet. App. A-15 to A-16; A-22 to A-23. The Court concluded that under its plain language, the listing of Leisnoi as a “village corporation” in Section 1427(a), and the declaration that Leisnoi was “entitled” to deficiency lands, demonstrated that Congress intended “to treat Leisnoi as an eligible village corporation under ANCSA.” Pet. App. A-17. The Court concluded that the plain meaning of Section 1427 also “exempted” Leisnoi from ANCSA’s village eligibility requirements, stating that “a Congressional determination that Leisnoi is a village corporation exempts Leisnoi from having to satisfy ANCSA’s eligibility requirements.” Pet. App. A-20.

The Court stated that its construction of Section 1427 was also supported by the purpose of Section 1427, which, it stated, was “to facilitate and expedite the conveyance of federal lands within the State to . . . Alaska Natives under ANCSA.” Pet. App. A-21 to A-22. The Court reasoned that “[t]he desire to facilitate a rapid land allocation supports the view that Congress intended to include Leisnoi as an eligible native village corporation, rather than leave its status uncertain.” Pet. App. A-22.

The Court rejected the Petitioner’s contention that its interpretation of Section 1427 was governed by the canons of statutory construction regarding repeals by implication. In concluding that Section 1427 had “ratified” the Secretary’s determination of Leisnoi’s eligibility, the Court summarily concluded, in a footnote, that “[t]he foregoing analysis leads us to reject Stratman’s contention that in order to

conclude that ANCSA's eligibility requirements do not apply to Leisnoi, we must find that § 1427 repealed the relevant eligibility and enforcement provisions of ANCSA." Pet. App. A-28 n. 5. The Court also "declined" to examine the legislative history of Section 1427, finding that its meaning was sufficiently "clear" from its plain language, stating that "[w]e decline to wade into § 1427's unhelpful legislative history to further clarify a matter of interpretation resolved on the face of the statute." Pet. App. A-22.

## **REASONS FOR GRANTING THE PETITION**

### **I. The Ninth Circuit's Decision Invalidated An Act Of Congress**

In interpreting Section 1427 as having exempted Leisnoi from having to satisfy ANCSA's village eligibility requirements, the Ninth Circuit effectively invalidated ANCSA's village eligibility provisions as they applied to Leisnoi. Although the Ninth Circuit disagreed that its interpretation involved the repeal by implication of ANCSA's village eligibility provisions as to Leisnoi, its conclusion that Section 1427 "exempted" Leisnoi from having to satisfy ANCSA's village eligibility requirements, and mooted the Petitioner's action, was necessarily based on an implicit determination that these provisions had been repealed by implication.

The fact that the Ninth Circuit's interpretation

invalidated ANCSA's village eligibility provisions without having analyzed and determined whether Congress had intended their repeal, raises a substantive issue of statutory construction. In enacting ANCSA's village eligibility provisions, Congress clearly manifested its intent and will that Leisnoi be required to satisfy ANCSA's statutory criteria for eligibility as a Native village, that the Secretary make specific findings to this effect, and that the Secretary's determination be subject to an action for judicial review to insure its correctness. To invalidate these provisions without finding that Congress had intended their repeal thwarts Congress' manifest will, and abrogates the policies it chose to establish in the invalidated provisions. In this respect, the Ninth Circuit's decision is the same as if it had invalidated these provisions on the ground they were unconstitutional. The fact that the invalidated provisions relate to a substantive enactment by Congress, involving the exercise of its plenary and exclusive authority to both regulate Indian affairs and dispose of the nation's public lands, provides even greater reason for review of its decision.

## **II. The Ninth Circuit's Decision Is Erroneous And Conflicts With This Court's Precedents**

The primary error in the Ninth Circuit's analysis and interpretation of Section 1427 was its failure to apply the canons of statutory construction relating

to repeals by implication. Under this Court's precedents, a determination that a subsequent enactment has repealed the provisions of a prior existing statute by implication is subject to several well-established canons of statutory construction, including: 1) that repeals by implication are not favored, and the proponent of a determination of repeal by implication "bears a heavy burden of persuasion;"<sup>8</sup> 2) when two statutes are capable of co-existence, it is the duty of the courts to regard each as effective, absent a clearly expressed congressional intention to the contrary;<sup>9</sup> 3) a congressional intent to repeal must be "clear and manifest,"<sup>10</sup> 4) in the absence of a clear and manifest intent to repeal, the provisions of both statutes must be given effect unless they are in "irreconcilable conflict," in the sense that there is a "positive repugnancy between them or that they cannot mutually coexist;"<sup>11</sup> and 5) repeal is to be regarded as implied "only if necessary to make the later enacted law work, and even then only to the

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<sup>8</sup> *Amell v. United States*, 384 U.S. 158, 165-166, (1966).

<sup>9</sup> *Morton v. Mancari*, 417 U.S. 535, 549-551 (1974).

<sup>10</sup> *Id.*

<sup>11</sup> *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155-155, (1976).

minimum extent necessary.”<sup>12</sup>

The Ninth Circuit denied that its interpretation of Section 1427 involved the repeal of ANCSA’s village eligibility provisions as to Leisnoi. Pet. App. A-28 n. 5. However, its conclusion that Section 1427 mooted the Petitioner’s action was necessarily based on an implicit determination that these provisions had been repealed by implication. Because these provisions provided the statutory grounds for the Petitioner’s action for review of the Secretary’s determination of Leisnoi’s eligibility, their modification or repeal was necessary in order to “moot” his action. *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 438-441 (1992); *Friends of the Earth v. Weinberger*, 562 F.Supp. 265, 271-272 (D.D.C. 1983). This implicit determination is also reflected in the court’s own analysis. The court concluded that Section 1427 ratified Leisnoi’s eligibility and “exempt[ed] Leisnoi from having to satisfy ANCSA’s village eligibility requirements.” Pet. App. A-20. To “exempt” is to partly repeal. Because the Ninth Circuit’s interpretation rested on an implicit determination that Section 1427 repealed ANCSA’s village eligibility provisions as to Leisnoi, its interpretation was governed, under this Court’s precedents, by the canons of statutory construction relating to repeals by implication. *Rodriquez v. U.S.*, 480 U.S. 522, 523-524 (1987);

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12 *Id.*

*U.S. v. United Continental Tuna Corp.*, 425 U.S. 164, 166-169 (1976).

The Ninth Circuit erred in determining that Section 1427 “exempted” Leisnoi from ANCSA’s village eligibility requirements, based on its “plain language.” The court found that the plain language of Section 1427, listing Leisnoi as a “village corporation,” demonstrated a congressional intent “to treat Leisnoi as an eligible village corporation under ANCSA.” Pet. App. A-16. From this, the court extrapolated a broader congressional intent to “exempt Leisnoi from having to satisfy ANCSA’s village eligibility requirements.” Pet. App. A-20. However, the court’s finding that Section 1427 “treat[ed] Leisnoi as an eligible village corporation” should have been the beginning of the court’s analysis, not the end. The plain language of Section 1427 demonstrated only that there was an apparent inconsistency between Section 1427 and ANCSA’s prior village eligibility provisions. In order to find that Section 1427 repealed ANCSA’s village eligibility provisions as to Leisnoi, the court was required to examine and determine whether there was either a “clear and manifest” Congressional intent to repeal, or whether the provisions of Section 1427 were in “irreconcilable conflict” with ANCSA’s village eligibility provisions. *Radzanower*, 426 U.S. at 154-155. In the absence of such a determination, the court had the duty to regard ANCSA’s village eligibility provisions as fully effective as to Leisnoi. *Id.*

In this case, there was no “clear and manifest” intent to repeal ANCSA’s village eligibility provisions as to Leisnoi. Although the language of Section 1427 may have “treat[ed] Leisnoi as an eligible village corporation,” as was found by the Ninth Circuit, this does not itself demonstrate a “clear and manifest” intent to repeal ANCSA’s village eligibility provisions as to Leisnoi. The issue, never examined by the Ninth Circuit, is whether Congress, by treating Leisnoi as an eligible village corporation in Section 1427, intended to “exempt” Leisnoi from ANCSA’s village eligibility requirements (and thereby partly repeal them as to Leisnoi). The legislative history of Section 1427, which the Ninth Circuit refused to consider, shows that Congress had been unaware of the fact that the Secretary’s determination of Leisnoi’s eligibility had been challenged by the Petitioner, and was the subject of a pending action for judicial review. It shows that Congress enacted Section 1427’s provisions under the mistaken belief that the Secretary’s determination of Leisnoi’s eligibility had already become final, and that ANCSA’s village eligibility requirements had already been determined to have been satisfied by Leisnoi.<sup>13</sup> If

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13 At the time it enacted Section 1427, the Secretary’s determination of Leisnoi’s eligibility *was* final, as to everyone *except the Petitioner*, who was excused for his failure to challenge the Secretary’s otherwise final determination of Leisnoi’s eligibility in the original

Congress mistakenly believed that Leisnoi had already satisfied ANCSA's village eligibility requirements, including the making of a final determination of its eligibility by the Secretary, then it could not have intended to "exempt" Leisnoi or partly repeal these provisions when it enacted Section 1427 and "treat[ed] Leisnoi as an eligible village corporation." If anything, it demonstrates just the opposite— that Congress intended, and believed, that ANCSA's village eligibility provisions had already been applied to and satisfied by Leisnoi.

Nor was there an "irreconcilable conflict" between Section 1427's provisions and ANCSA's village eligibility provisions. Section 1427 simply amended ANCSA's original land selection and entitlement provisions with respect to the Koniag region villages, to exchange the "deficiency" lands that been withdrawn for their selection and conveyance on the Alaskan Peninsula, for other lands located on Afognak Island. These amended land selection and entitlement provisions are not in "irreconcilable conflict" with ANCSA's village eligibility provisions, just as ANCSA's original land selection and entitlement provisions were not in irreconcilable conflict with them. The Ninth Circuit acknowledged that effect could be given to both

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administrative proceedings, due to the DOI's failure to provide him with actual notice of the proceedings. *Stratman v. Watt*, 656 F.2d 1321, 1325 (9<sup>th</sup> Cir. 1981).

Section 1427 and ANCSA's village eligibility provisions, but denied that it was required to do so. Pet. App. A-17 to A-18.

The Ninth Circuit also erred in inferring a congressional intent to "exempt" Leisnoi from ANCSA's village eligibility provisions, based on the perceived "purpose" of Section 1427. The court concluded that its construction of Section 1427 was supported by its purpose, which the court stated was to "facilitate a rapid land allocation" under ANCSA. Pet. App. A-22. However, the court failed to consider the competing purposes of ANCSA's village eligibility and judicial review provisions, which elevated the interests of ensuring the correctness of the Secretary's eligibility determinations, and enforcing ANCSA's eligibility requirements, over the interests of "rapidity" and "finality," in order to "assure that grants of public lands would be made only to eligible Native groups." *Koniag, Inc. v. Andrus*, 580 F.2d at 610-11. As this Court has held, in determining whether one statute has repealed a prior statute by implication, it is not the province of the courts to choose between competing legislative choices, and it is "impermissible" for the court to determine that the purpose of the subsequent enactment will be best served by repealing the provisions of the prior statute. *Rodriguez v. U.S.*, 480 U.S. 522, 523-526 (1987).

### **III. The Ninth Circuit's Decision Abrogated Important Policies Established By Congress In The Exercise Of Its Plenary And Exclusive Authority To Regulate Indian Affairs And Dispose Of Public Lands**

In addition to substantive issues of statutory construction involving the invalidation of a prior congressional enactment, the enactment that was invalidated by the Ninth Circuit in this case also involves important policies that were adopted by Congress in the exercise of its plenary and exclusive authority to regulate Indian affairs and dispose of the nation's public lands.

This Court has described Congress' constitutional power to legislate matters relating to Indian affairs as "plenary and exclusive." *U.S. v. Lara*, 541 U.S. 193, 200 (2004). This Court has also held that Congress' power to dispose of the public lands entrusted to it is "without limitations;" and that "it is not for the courts to say how that trust shall be administered. That is for Congress to determine." *U.S. v. San Francisco*, 310 U.S. 16, 29-30 (1940). ANCSA involved the exercise of both of these powers.

ANCSA's village eligibility requirements go to the heart of the policy adopted by Congress for managing Indian affairs in Alaska. Congress imposed ANCSA's village eligibility requirements, and mandated that the Secretary make a specific finding of their satisfaction, subject to an action for

judicial review, as a strict condition precedent to the recognition of an entity's status as an aboriginal village entitled to receive ANCSA settlement benefits. Satisfaction of these requirements was required in order to be recognized by Congress as an aboriginal village having an aboriginal claim for which settlement was being made. Satisfaction of these requirements was also made an express condition precedent to the conveyance of public lands to such entities. 43 U.S.C. § 1613(a).

In view of the integral importance of these requirements to the policies adopted by Congress in its management of Indian affairs and public lands in the state of Alaska, their invalidation by the Ninth Circuit is a serious action that warrants review by this Court.

#### **IV. Review Of The Ninth Circuit's Decision Will Prevent The Commission Of A Fraud On The United States**

The Ninth Circuit's decision effectively ends the last possible challenge to Leisnoi's certification as an eligible Native village, in spite of the fact that Leisnoi has now been determined by the IBLA to not have been qualified for eligibility under ANCSA, and that it obtained its certification as an eligible Native village on the basis of a fraudulent application for eligibility. The IBLA's findings remain undisturbed, by either the courts or the Secretary's decision on reconsideration of the IBLA's decision. However, because the district

court never vacated the Secretary's original determination of Leisnoi's eligibility when it remanded the case to the IBLA to re-determine Leisnoi's eligibility, the Secretary's original 1974 determination of Leisnoi's eligibility still remains in effect— and it will remain in effect forever unless it is vacated in this case. Consequently, the practical and legal effect of the Ninth Circuit's decision, if it is allowed to stand, is to forever insulate the Secretary's determination of Leisnoi's eligibility from challenge and invalidation, and to forever vest title and possession in Leisnoi to the public lands that the IBLA has now determined Leisnoi wrongfully obtained under ANCSA.

The Ninth Circuit's decision will have a significant impact on the residents of Kodiak. Leisnoi has thus far received over 75 square miles of formerly public lands on and around the Island of Kodiak. Much of this land is located on the outskirts of the city of Kodiak, the seventh largest city, by population, in the state of Alaska. Because the site of the alleged village, on the island of Woody Island, lies only one mile off the coast from the city of Kodiak, Leisnoi was entitled to select, and ultimately received, formerly public lands located on the outskirts of the city of Kodiak, as well as lands located along Kodiak's sole coastal roadway, which leads from the city of Kodiak and runs south along the eastern side of the island to Cape Chiniak, where Leisnoi also holds lands. These formerly public lands had long been used by the residents of Kodiak for recreational purposes,

and for subsistence hunting and fishing, as well as for access to other lands located in the Island's interior. Since receiving these lands, Leisnoi has restricted their access, and no longer allows Kodiak's residents or visitors to access or use them without obtaining a special permit. These restrictions have caused a significant disruption to the use of these lands, and have become a source of conflict between Leisnoi and the residents of Kodiak, including both non-Native residents and Native residents who are not Leisnoi shareholders. See Eric Wander, *Leisnoi Enforcing Land-Use Policies*, The Kodiak Daily Mirror, Sept. 4, 2008.<sup>14</sup>

Review by this Court will prevent the commission of a fraud on the United States, and will restore to the public domain the lands that Leisnoi wrongfully obtained. It will also effectuate the policies established Congress in accordance with its manifest intent.<sup>15</sup>

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14 [www.kodiakdailymirror.com/?pid=19&id=6625](http://www.kodiakdailymirror.com/?pid=19&id=6625).

15 It should be noted that the invalidation of Leisnoi's certification as an eligible Native village would not result in the disenfranchisement of the Natives who were enrolled to it, or who are its current shareholders. Under the procedure adopted by Congress for this very contingency, they would simply be re-enrolled to, and become shareholders of, other existing village and/or regional Native corporations, according to their (or their ancestor's) actual place of residence on April 1, 1970. See Section 1(c) of the Act of Jan. 2, 1976, P.L. 92-204, 89 Stat.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 5, 2009

**APPENDIX A**

**United States Court of Appeals  
for the Ninth Circuit**

**Opinion**

**dated October 6, 2008**

APPENDIX A - 1

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

OMAR STRATMAN	)	
<i>Plaintiff-Appellant,</i>	)	No. 07-35934
	)	D.C. No.
v.	)	CV 02-0290
	)	JKS
LEISNOI, INC.; KONIAG,	)	
INC.; DIRK KEMPTHORNE,	)	
Secretary of the Interior,	)	OPINION
<i>Defendants-Appellees.</i>	)	
	)	

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Appeal from the United States District Court  
for the District of Alaska

James K. Singleton, District Judge, Presiding

Argued and Submitted  
August 6, 2008--Anchorage, Alaska

Filed October 6, 2008

Before: Dorothy W. Nelson, A. Wallace Tashima,  
and Raymond C. Fisher, Circuit Judges.

Opinion by Judge Tashima

## **APPENDIX A - 2**

### **COUNSEL**

Michael J. Snider, Anchorage, Alaska, for the plaintiff-appellant.

David C. Shilton, Environmental & Natural Resources Division, U.S. Department of Justice, Washington, D.C., for defendant-appellee Dirk Kempthorne, Secretary of the Interior.

R. Collin Middleton, Anchorage, Alaska, for defendant-appellee Koniag, Inc.

John Richard Fitzgerald, Morrison Mahoney, Boston, Mass., for defendant-appellee Leisnoi, Inc.

### **OPINION**

TASHIMA, Circuit Judge:

In 1976, Omar Stratman began his quest to challenge the Secretary of the Interior's (the "Secretary") certification of Woody Island as a native village under the Alaska Native Claims Settlement Act ("ANCSA"). Thirty-two years later, we must decide whether Congress ratified the Secretary's favorable 1974 eligibility determination when, in 1980, it enacted the Alaska National Interest Lands Conservation Act ("ANILCA") which listed Woody Island's village

## APPENDIX A - 3

corporation, Leisnoi, Inc. ("Leisnoi"), as a "deficiency village corporation" entitled to lands under ANCSA. We hold that it did. Therefore, we dismiss Stratman's appeal as moot.

## BACKGROUND

### *Statutory Framework*

#### I. ANCSA

Congress enacted ANCSA in 1971 in order to "resolve land disputes between the federal government, the state of Alaska, Alaskan Natives, and non-native settlers." *Leisnoi, Inc. v. Stratman*, 154 F.3d 1062, 1064 (9th Cir. 1998). In its findings and declaration of policy, Congress recognized "an immediate need for a fair and just settlement" of aboriginal land claims that was to be "accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, [and] without litigation . . ." 43 U.S.C. § 160l(a),(b). In furtherance of this basic purpose, "Alaskan Natives received, in exchange for the extinction of all claims of aboriginal title, approximately forty-four million acres of land and nearly \$1 billion in federal funds." *Leisnoi*, 154 F.3d at 1064. These resources were distributed amongst thirteen "Regional Corporations," groups of Natives unified by a "common heritage and sharing common interests[.]" 43 U.S.C. § 1606(a), and an unspecified number of "Village

## APPENDIX A - 4

Corporations," corporate entities based around native villages. 43 U.S.C. § 1607. The native villages were defined to include "any tribe, band, clan, group, village, community, or association in Alaska" either listed by name or determined by the Secretary to have met certain requirements. 43 U.S.C. § 1602(c).

To qualify as a "native village" under ANCSA, the Secretary must determine that:

- (A) twenty-five or more Natives were residents of an established village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; and
- (B) the village is not of a modern and urban character, and a majority of the residents are Natives.

43 U.S.C. § 1610(b)(2). Department of the Interior ("DOI") regulations establish procedures for determining village eligibility, and initially envisioned that these determinations would be made by the end of 1973; the Director of the Juneau Area Office ("Regional Director") of the Bureau of Indian Affairs ("BIA") was required to make an initial determination of eligibility not later than December 19, 1973, 43 C.F.R. §

## APPENDIX A - 5

2651.2(a)(8), and protests to the eligibility determination were barred if brought 30 days after publication of the decision, *id.* at § 2651.2(a)(9). The Regional Director was required to render a decision as to the protest within 30 days, *id.* at § 2651.2(a)(4), and appeal from that decision could be taken before the Interior Board of Land Appeals ("IBLA"), *id.* at § 2651.2(a)(5). That decision would not become final until personally approved by the Secretary. *Id.*

Although ANCSA fixes the total allocation from the Federal government to village corporations at twenty-two million acres, the final allocation of land to each village corporation depends upon the distribution of Native Alaskans in eligible villages. First, the area included in the patent issued to the village corporation varies based on the number of natives residing in the village: for example, a village with twenty-five Native Alaskans is entitled to patent an area of public lands equal to 69,120 acres, while a village with a population of over 600 is entitled to 161,280 acres. See 43 U.S.C. § 1613(a). Next, any difference between the twenty-two million acres reserved for village corporations and the amount of land actually claimed by eligible villages as discussed above must be reallocated "on an equitable basis after considering historic use, subsistence needs, and population." 43 U.S.C. §

## APPENDIX A - 6

1611(b).<sup>1</sup> The final allocation of lands to eligible village corporations is therefore contingent upon the resolution of the eligibility of all other putative villages within each regional corporation. Further, the village allocations affect the computation of lands granted to the regional corporations, if the area patented to the village corporations within a regional corporation exceeds the percentage of acreage allotted to the regional corporation based on its relative size within the state. See 43 U.S.C. § 1611(c)(1)-(2).

Once a village is deemed eligible, its village corporation may select lands pursuant to 43 U.S.C. § 1611. In those situations where land selection criteria cannot be met because of a deficiency of available lands, the Secretary must "withdraw three times the deficiency from the nearest unreserved, vacant and unappropriated public lands[.]" withdrawing, "insofar as possible, . . . lands of a character similar to those on which the village is located and in order of their proximity to the center of the Native village[.]" 43 U.S.C. § 1610(a)(3)(A).

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<sup>1</sup>In the current version of § 1611(b), Congress specified that this allocation was to have taken place no later than October 1, 2005. Aside from this addition, this section remains essentially unchanged from the 1971 version. Compare Pub. L. No. 92-203, § 12(b), 85 Stat. 688, 701 (1971).

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The foregoing eligibility and land selection provisions of ANCSA created problems for villages within the Koniag, Inc. ("Koniag") region, Leisnoi's regional corporation, because of a shortage of available lands on Kodiak Island. A further problem for Koniag, and the village corporations in the region, was uncertainty over the status of several putative villages. In the mid-through late-1970s, eleven villages brought suits challenging ineligibility determinations made by the Secretary. See *Koniag, Inc. v. Andrus*, 580 F.2d 601, 603-04 (D.C. Cir. 1978). Congress addressed these problems in ANILCA.

## II. ANILCA

Although ANILCA is generally concerned with the designation, disposition, and management of land for environmental preservation purposes, see ANILCA, Pub. L. No. 96-487, § 101, 94 Stat. 2371, 2374-75, (codified at 16 U.S.C. § 3101), part of ANILCA is devoted to the implementation and cleanup of ANCSA. In particular, Part A of Title XIV includes amendments to ANCSA, and Part B contains "Other Related Provisions." See 94 Stat. 2374 (Table of Contents). Those provisions resolve extant membership, land, and village status questions. See *id.* Section 1427 concerned issues specific to Koniag and was referred to as the "Koniag Amendment."

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Section 1427(a) contains several definitions relevant to this dispute. Because of the deficiency of available lands on Kodiak island, the Koniag villages had been previously assigned deficiency lands on the Alaska Peninsula by the Secretary. These lands, described as "Deficiency village acreage on the Alaska Peninsula," were defined as "the aggregate number of acres of public land to which 'Koniag deficiency Village Corporations' are entitled under section 14(a) [43 U.S.C. § 1613] . . ." § 1427(a)(2), 94 Stat. 2518. The subsection also defined "Koniag deficiency village corporation" explicitly to include Leisnoi. *See* § 1427(a)(4), 94 Stat. 2519 (" 'Koniag deficiency village corporation' means any or all of the following: . . . Leisnoi, Incorporated[.]"). Another definition made Leisnoi eligible, upon Koniag's designation, to receive land under § 12(b) of ANCSA, 43 U.S.C. § 1611(b), as a "village corporation[ ] listed . . . above[.]" § 1427(a)(5).

Subsection (b) contains several relevant substantive provisions. First, it provides that "[i]n full satisfaction of . . . the right of each Koniag Deficiency Village Corporation to conveyance under [ANCSA] of the surface estate of deficiency village acreage on the Alaska Peninsula . . . and in lieu of conveyances thereof otherwise, the Secretary of the Interior shall, under the terms and conditions set forth in this section, convey . . . lands on Afognak Island . . ." § 1427(b)(1), 94

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Stat. 2519-20. Pursuant to this exchange of lands on Afognak Island for those on the Alaska Peninsula, the claims of the deficiency villages and Koniag to lands on the Peninsula would be extinguished, all claims arising under ANCSA or this section of ANILCA relating to this transaction would be barred, and the land would be included within the Alaska Peninsula Wildlife Refuge. § 1427(b)(3), 94 Stat. 2522.

Subsection (e) resolves an ongoing legal dispute involving the eligibility challenges by the eleven villages. *See Koniag*, 580 F.2d at 601. By releasing the United States and its agents from all prior claims arising under ANCSA, they would "be deemed an eligible village" under ANCSA. § 1427(e)(1), 94 Stat. 2525. Finally, subsection (f) provides that "[a]ll conveyances made by reason of this section shall be subject to the terms and conditions of [ANCSA] as if such conveyances (including patents) had been made or issued pursuant to that Act." § 1427(f), 94 Stat. 2526.

Section 1412, in Part A of Title XIV, states that, "[e]xcept as specifically provided in this Act, (i) the provisions of [ANCSA] are fully applicable to this Act, and (ii) nothing in this Act shall be construed to alter or amend any of such provisions."

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### *Procedural History*

In 1976, Stratman and several other plaintiffs filed suit in the District of Alaska, seeking to enjoin the Secretary from issuing lands to three villages on or around Kodiak Island, one of which was Woody Island, on the ground that the villages did not satisfy ANCSA's certification requirements. This action, No. CV 76-132, has been referred to by the parties as the decertification action.

The district court initially dismissed the claims made by the plaintiffs asserting recreational use of Woody Island because those plaintiffs did not exhaust their administrative remedies under 43 C.F.R. § 2651. *Kodiak-Aleutian Chapter of the Alaska Conservation Soc'y, v. Kleppe*, 423 F. Supp. 544, 546 (D. Alaska 1976). However, Stratman and another plaintiff, Toni Burton, avoided dismissal on the ground that, as the owners of grazing leases potentially affected by Leisnoi's land selections, they were entitled to actual notice of Woody Island's certification. Leisnoi later mooted Stratman's action by relinquishing all claims to the land involving the grazing leases, see *Stratman v. Andrus*, 472 F. Supp. 1172, 1173 (D. Alaska 1979), and the district court dismissed Stratman's claim on that basis. *Id.* at 1174. This court reversed the

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district court, holding that Stratman's claim was not barred by a failure to exhaust administrative remedies because he was not given actual notice of the certification, and that he still had standing to sue on the basis of his alleged recreational use. *Stratman v. Watt*, 656 F.2d 1321, 1324-25 (9th Cir. 1981). We remanded to provide Stratman with the opportunity to pursue his administrative remedies. *Id.* at 1326.

On remand, in 1982, the parties entered into a settlement agreement. The failure of the parties to abide by the terms of the settlement agreement eventually resulted in our determination that Stratman could reopen the decertification action in federal court. *Stratman v. Leisnoi*, 1994 WL 681071, at \*4 (9<sup>th</sup> Cir. Dec. 5, 1994). The district court concluded that the matter was not ripe for judicial review without a formal determination on the merits of Stratman's claims by the agency. It therefore remanded the matter to the IBLA and dismissed Stratman's action.

Following remand, a hearing was held on Woody Island's eligibility. The administrative law judge issued an opinion on October 13, 1999, concluding with three findings:

- (1) The alleged Village did not have 25 or more Native residents on April 1, 1970, (2) The alleged Village, as of

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April 1, 1970, was not an established Native village and did not have an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and life-style, and (3) Less than 13 enrollees to the alleged Village used it during 1970 as a place where they actually lived for a period of time.

Three years later, the IBLA affirmed the merits of Stratman's claim. 157 I.B.L.A. 302 (2002).

Shortly thereafter, Stratman filed the instant action. In the meantime, however, Leisnoi petitioned the Secretary for review of the IBLA decision pursuant to 43 C.F.R. § 2651.2(a)(5) (providing that "[d]ecisions of the Board on village eligibility appeals are not final until personally approved by the Secretary"), and 43 C.F.R. § 4.5(a)(2) (granting the Secretary authority to "review any decision of any employee or employees of the Department . . . to reconsider a decision . . .").

On December 11, 2006, the Office of the DOI Solicitor issued a memorandum reviewing the 2002 decision of the IBLA. The Solicitor concluded that § 1427 of ANILCA ratified the eligibility determination of the Secretary, and thus mooted Stratman's challenge to Leisnoi's

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certification. The Solicitor first observed that § 1427 was "quite clear" in treating Leisnoi as an eligible village. To the extent that the statute was ambiguous, the Solicitor resolved the ambiguity in favor of Leisnoi in light of Congress' desire to resolve the land entitlements of Koniag as soon as practicable. The Secretary adopted the Solicitor's memorandum as his own decision and "disapprove[d] the decision of the IBLA."

Following the issuance of the Secretary's decision in late 2006, Stratman filed a third amended complaint in which he sought enforcement of the IBLA's 2002 decision. On September 26, 2007, the district court granted the Secretary, Leisnoi, and Koniag's (collectively, the "defendants") motion to dismiss on the ground that § 1427 of ANILCA ratified the Secretary's 1974 eligibility determination, rendering Stratman's action moot. Stratman timely appealed.

### STANDARD OF REVIEW

We review *de novo* the district court's dismissal of a complaint under Fed. R. Civ. P. 12(b)(1). *Wah Chang v. Duke Energy Trading & Mktg., LLC*, 507 F.3d 1222, 1225 (9th Cir. 2007). Federal jurisdiction over this case depends on whether ANILCA § 1427 has rendered Stratman's administrative challenge moot. We review this question of statutory interpretation *de novo*. See

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*Alaska Wildlife Alliance v. Jensen*, 108 F.3d 1065, 1069 (9th Cir. 1997).

### ANALYSIS

"[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed." *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). We have repeatedly recognized that the enactment of a new law that resolves the parties' dispute during the pendency of an appeal renders the case moot. See, e.g., *Consejo de Desarrollo Economico de Mexicali, A.C. v United States*, 482 F.3d 1157, 1168 (9th Cir. 2007) (interpreting relevant provisions of the Tax Relief and Health Care Act of 2006 to exempt a canal lining project from statutory environmental claims); *Qwest Corp. v. City of Surprise*, 434 F.3d 1176, 1181 (9th Cir. 2006). Here, the defendants contend that § 1427 of ANILCA had the effect of designating Leisnoi as an eligible village corporation and conveying land to Leisnoi, thereby ratifying the Secretary's eligibility determination and rendering moot Stratman's challenge. Stratman, on the other hand, contends that § 1427 is a land withdrawal and selection provision that merely identified Leisnoi as a village whose land selection might change if it

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satisfied the eligibility requirements of ANCSA. We agree with the defendants.

### I. Congressional intent

#### A. *Statutory language and framework*

When interpreting a statute, we must first "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Texaco Inc. v. United States*, 528 F.3d 703, 707 (9th Cir. 2008) (citation and quotation marks omitted). Along with the specific provisions at issue, we examine "the structure of the statute as a whole, including its object and policy." *Consejo de Desarrollo Económico*, 482 F.3d at 1168 (citation and quotation marks omitted). "In viewing the statutory context, we attempt to give effect, if possible, to every clause and word of a statute . . ." *Id.* (internal citation and quotation marks omitted). We therefore turn to § 1427 and other related provisions of ANILCA.

[1] Section 1427, titled "Koniag Village and Regional Corporation lands," falls within the portion of ANILCA devoted to the resolution of issues specific to villages and regional corporations. In support of their position, the defendants point to § 1427(a), which defines "[d]eficiency village acreage on the Alaska Peninsula" as "the aggregate number of acres of

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public land to which 'Koniag deficiency Village Corporations' are *entitled*, under section 14(a) of [ANCSA]," § 1427(a)(2) (emphasis added), and "Leisnoi, Incorporated" as a "Koniag deficiency village corporation . . . § 1427(a)(4). Section 14(a) of ANCSA, 43 U.S.C. § 1613(a), entitles eligible village corporations to a patent for surface estates. To the extent that a shortage of land exists around the village, § 11 of ANCSA, 43 U.S.C. § 1610(a)(3), requires the Secretary to withdraw deficiency acreage from the nearest unappropriated public lands of a similar character. Under ANCSA, a village logically must be deemed eligible before the problem of land deficiency can possibly arise. The fact that § 1427 identifies Leisnoi as a Koniag deficiency village corporation and further indicates that such deficiency village corporations are entitled to land under ANCSA is strong evidence of Congress' intent to treat Leisnoi as an eligible village.

[2] Section 1427(b) goes on to state that "[i]n full satisfaction of . . . the *right* of each Koniag Deficiency Village Corporation to conveyance under [ANCSA] of the surface estate of deficiency village acreage on the Alaska Peninsula . . . the Secretary of the Interior shall . . . convey . . . the surface estate of . . . public lands on Afognak Island . . ." § 1427(b)(1) (emphasis added). Under the plain language of the statute, then, Leisnoi is *entitled*, § 1427(a)(2), and has the *right*, § 1427(b)(1), to public land under § 14(a) of ANCSA.

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This language inexorably leads to the conclusion that Congress intended to treat Leisnoi as an eligible village corporation under ANCSA. It would defy logic and common sense for Congress to deem Leisnoi entitled to deficiency lands without also implicitly having found that it was entitled to other lands under § 14(a) of ANCSA. It would also be illogical for Congress to convey lands to an ineligible village corporation. Further, Congress identified only one condition precedent to conveyance of land to Leisnoi: Leisnoi's acceptance of the conveyance of Afognak Island in "full satisfaction of [its] respective entitlement[ ] to conveyances . . . on the Alaska Peninsula . . ." § 1427(b)(4). Given that Congress did not require Leisnoi to meet any additional requirements to acquire land under ANCSA, it follows that Congress intended to treat Leisnoi as an eligible village, and granted it the right to land as such.

Stratman contends that the plain language of § 1427 incorporates the eligibility requirements of ANCSA. He argues that because there is no apparent conflict between § 1427's land exchange and entitlement provisions and ANCSA § 11(b)(3)'s, 43 U.S.C. § 1610(b)(3), village eligibility requirements, effect can be given to both. This approach puts the cart before the horse: he says that because the statutes *can* be read together, that Congress must have *intended* his interpretation. Yet, such an intent would appear to conflict with the unqualified declaration that

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Leisnoi is a deficiency village corporation, and with the fact that § 1427 does not explicitly incorporate ANCSA's eligibility requirements.

[3] Stratman raises several other arguments in support of his position based on the overall structure of the statute. First, he points to § 1427(f), which provides that "[all] conveyances made by reason of this section shall be subject to the terms and conditions of [ANCSA] as if such conveyances (including patents) had been made or issued pursuant to that Act." He notes that § 14(a) of ANCSA, 43 U.S.C. § 1613(a), provides for the issuance of a patent to village corporations "which the Secretary finds [are] qualified for land benefits under [ANCSA]." Because a conveyance under ANCSA can only be made after a finding of eligibility, he argues that § 1427(f) first requires a finding of eligibility. Unfortunately, this interpretation ignores the explicit language of § 1427(f). By its own terms, the subsection is limited to "conveyances," not eligibility determinations. Further, the above-quoted provision in ANCSA which incorporates the Secretary's eligibility determination is a dependent adverbial clause: the language discussing eligibility does not govern the conveyance, but only specifies when the conveyances may occur. As such, that language does not necessarily pertain to the "ma[king] or issu[ing]" of conveyances "pursuant to [ANCSA]." § 1427(f).

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[4] Stratman next argues if Congress had intended to exempt Leisnoi from meeting ANCSA's eligibility requirements, it would have done so explicitly: Congress clearly knew how to make exceptions to ANCSA's eligibility requirements, as it did with the seven villages which brought challenges to the Secretary's finding of ineligibility as to those villages. See *Koniag*, 580 F.2d at 601 (involving challenges brought by the ineligible Koniag villages). In § 1427(e), Congress allowed those villages to "be deemed an eligible village under [ANCSA]" if it released the United States from its prior claims brought under the act. §§ 1427(e)(1),(2). This argument cuts both ways: on the one hand, Congress could have included clear language that deemed Leisnoi eligible despite any failure to meet the eligibility requirements; on the other, the fact that Congress did not make an exception for Leisnoi, and instead listed it as a deficiency village, implies that Congress already deemed it an eligible village.<sup>2</sup>

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<sup>2</sup>Stratman also contends that the definitions of "Koniag village" and "Koniag Village Corporation" incorporate ANCSA's definitions of villages and village corporations, thus reaffirming the viability of ANCSA's certification requirements. Compare §§ 1427(a)(7), (8) with 43 U.S.C. §§ 1602(c), 1607. It is not immediately clear, however,

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[5] Finally, Stratman contends that § 1412, which provides that "[e]xcept as specifically provided in this Act, (i) the provisions of [ANCSA] are fully applicable to this Act, and (ii) nothing in this Act shall be construed to alter or amend any of such provisions[,"] expressly indicates that ANCSA's provisions apply absent a specific statement to the contrary. The deviations from ANCSA in § 1427, however, are specific enough to satisfy this "specific statement" requirement: a Congressional determination that Leisnoi is a village corporation exempts Leisnoi from having to satisfy ANCSA's eligibility requirements. Part B of Title XIV contains not only § 1427, resolving issues involving the Koniag region, but sections related to the specific needs of thirteen other regional or village corporations. *See* 94 Stat. 2374 (Table of Contents). The need explicitly to disclaim the requirements of ANCSA when referring to each specific transaction would be unduly burdensome, and a quick glance at the various provisions indicates that Congress did not do so in all cases. *See, e.g.*, §§ 1431(b),(c) (providing for an exchange of land between the United States and the Arctic Slope Regional Corporation without mentioning ANCSA). Moreover, in its section-by-section analysis, the

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that these definitions apply to Leisnoi, which was specifically identified as a deficiency village corporation under a different definition. *See* § 1427(a)(4).

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Senate Committee on Energy and Natural Resources characterized § 1412 as a general "savings clause" preserving the validity of ANCSA's requirements. *See S. Rep. No. 96-413*, at 314 (1980), *as reprinted in 1980 U.S.C.C.A.N.* 5070, 5258. In sum, a clause that makes the terms of an entire statute applicable to another statute does not necessarily displace a provision that specifically names Leisnoi as a deficiency village.<sup>3</sup>

### B. *Purpose*

[6] The Supreme Court observed in *Amoco Products Co. v. Gambell*, 480 U.S. 531 (1987), that "ANILCA's primary purpose was to complete the allocation of federal lands in the State of Alaska, a process begun with the Statehood Act in 1958 and continued in 1971 in ANCSA." *Id* at 549 (footnote omitted) (citing ANILCA § 101). Referring specifically to Title XIV, of which § 1427 is a part, the Court stated that "[t]he Act also provided means to facilitate and expedite the conveyance of federal lands within the State to . . . Alaska

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<sup>3</sup>In his reply brief, Stratman contends that the two-year statute of limitations added to ANCSA by § 902 of ANILCA, codified at 43 U.S.C. § 1632, indicates that Congress left the door open to challenges of the Secretary's eligibility determinations under ANCSA. Be that as it may, what is at issue here is not the Secretary's 1974 eligibility determination, but Congress's decision to refer to Leisnoi as a deficiency village corporation. Thus, Stratman's argument misses the point.

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Natives under ANCSA." *Id.* at 550. This purpose is reflected in the Senate Committee's summary of Title XIV, which it described as designed to "simplify administration of that Act and assure that the Natives receive full benefits which the Congress intended in the original law." 1980 U.S.C.C.A.N. 5073. Section 1427 of ANILCA calls for the exchange of deficiency lands on the Alaska Peninsula for lands on Afognak Island to take place "as soon as practicable," and sets a deadline of 60 days for Koniag to designate village corporations entitled to share the surface estate under § 12(b) of ANCSA, 43 U.S.C. § 1611(b). See § 1427(a)(5). The desire to facilitate a rapid land allocation supports the view that Congress intended to include Leisnoi as an eligible native village corporation, rather than leave its status uncertain.

[7] Based on the foregoing analysis, it is clear that Congress designated Leisnoi an eligible village without requiring that it satisfy the requirements for eligibility set out in ANCSA. We decline to wade into § 1427's unhelpful legislative history to further clarify a matter of interpretation resolved on the face of the statute. See *Consejo de Desarrollo Economico*, 482 F.3d at 1168 ("If the plain meaning of the statute is unambiguous, that meaning is controlling and we need not examine legislative history as an aid to interpretation unless the legislative history clearly indicates that Congress meant something

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other than what it said.") (citation and quotation marks omitted).<sup>4</sup>

### II. Effect on the Secretary's eligibility determination

[8] Congress viewed § 1427 as a cleanup measure in which it exercised its authority in order to effectuate the purposes ANCSA, irrespective of determinations made by the Secretary. Absent a constitutional impediment to the exercise of its authority, the intent of Congress to designate Leisnoi as an eligible village corporation and convey land to it as such must be given effect. The Property Clause of the Constitution gives Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States[.]" U.S. Const. art IV, § 3, cl. 2. The Supreme Court has "repeatedly observed that the power over the public land thus entrusted to Congress is without limitations." *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (citation, quotation marks, and alterations omitted). And we have recognized Congress' power to "deal with its lands precisely as an

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<sup>4</sup>Because we conclude that Congress clearly manifested its intent on the face of the statute, we need not reach the parties' arguments concerning the deference owed to the Secretary's interpretation of ANCSA and § 1427 of ANILCA.

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ordinary individual may deal with his . . . property. It may sell or withhold them from sale." *United States v. Gardner*, 107 F.3d 1314, 1318 (9th Cir. 1997) (quoting *Light v. United States*, 220 U.S. 523, 536 (1911)). Stratman does not contend, nor could he, that Congress lacked the power to patent lands to Leisnoi, or to designate Leisnoi as an eligible village if it so desired. Therefore, Congress' intent to treat Leisnoi as an eligible village corporation renders moot Stratman's challenge to Leisnoi's certification on the ground that it failed to meet ANCSA's requirements.

In *United States v. Alaska*, 521 U.S. 1 (1997), the United States and Alaska disputed ownership over certain submerged lands seaward of the low water line along the Arctic Coast within two federal reservations. *Id.* at 4-5. Under the Submerged Lands Act, enacted in 1953, and the Alaska Statehood Act, enacted in 1958, as well as the equal footing doctrine, Alaska was entitled to submerged lands extending three miles seaward from the coastline of the state. *Id.* at 5-6. One of the particular issues in dispute was whether Congress exercised its Property Clause power to prevent the lands at issue from passing to Alaska on statehood. *Id.* at 33. In 1923, the President, through an Executive Order, clearly intended to include the submerged lands at issue in the Federal reserve. *Id.* at 40. Alaska challenged the President's authority to include those submerged

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lands. *Id.* at 43. It argued that the source of executive authority, the Pickett Act, only granted the President the authority to select surface lands for the reserve. *Id.* at 44. The Court stated that even assuming that the President did not have authority under the Pickett Act to reserve the lands for the federal government, "Congress ratified the terms of the 1923 Executive Order in § 11(b) of the Statehood Act." *Id.* It held that the Executive Order "placed Congress on notice that the President had construed his reservation authority to extend to submerged lands and had exercised that authority to set aside . . . submerged lands in the Reserve . . ." *Id.* at 45. "Accordingly, Congress ratified the inclusion of submerged lands within the Reserve, whether or not it had intended the President's reservation authority under the Pickett Act to extend to such lands." *Id.*

[9] The mode of analysis in *Alaska* applies in this case. Congress clearly had the authority to designate Leisnoi an eligible village and to confer upon Leisnoi public lands. Its awareness of the Secretary's 1974 eligibility determination in favor of Leisnoi is established by the fact that Leisnoi was named in § 1427. See § 1427(a)(4). Regardless of whether the Secretary correctly determined that Leisnoi was eligible under ANCSA, Congress referred to the eligibility determination when it included Leisnoi as a "deficiency village

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corporation" endowed with the right "to conveyance under [ANCSA] of the surface estate of deficiency village acreage on the Alaska Peninsula[.]" §§ 1427(a)(4), (b)(1)(B). As in *Alaska*, the subsequent action of Congress makes the propriety of the underlying decision irrelevant, *even if* the underlying decision might have transgressed the intent of Congress. We have previously treated as final land conveyances to regional and village corporations under ANILCA:

Cube Cove was conveyed to Shee Atika and Sealaska by section 506 of ANILCA, . . . which provides in relevant part:

(c)(1) In satisfaction of the Natives of Sitka, . . . the Secretary of the Interior, upon passage of this Act, shall convey subject to valid existing rights . . . the surface estate in [Cube Cove].

We refuse to attribute to Congress the purpose [asserted by plaintiffs] to place . . . restrictions on land-use absent a clear expression of intent.

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*City of Angoon v. Hodel*, 803 F.2d 1016, 1022-23 (9th Cir. 1986).

[l0] Further, whether Congress conveyed land to Leisnoi under the allegedly mistaken assumption that Leisnoi was an eligible village is irrelevant. "While it is essential . . . [that] government agencies[ ] comply with the law, . . . [w]hether Congress was acting under a misapprehension of fact or law is irrelevant once legislation has been enacted." *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1461 (9th Cir. 1992). As long as the legislation is valid, it is not the duty of the courts to revise it:

If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. 'It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result.' This allows both of our branches to adhere to our respected, and respective, constitutional roles. In the meantime, we must determine intent from the statute before us.

*Lamie v. US. Trustee*, 540 U.S. 526, 542 (2004) (internal citation and quotation marks omitted).

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Congress treated Leisnoi as an eligible village, and conferred land rights to Leisnoi. By doing so, it ratified the Secretary's eligibility decision.<sup>5</sup>

## CONCLUSION

[11] We are not unmindful of the failure of our legal system to accomplish "rapidly, with certainty, [and] without litigation," 43 U.S.C. § 1601(b), a resolution of the disputed claims in this case. Nearly thirty years have now passed since the enactment of ANILCA and it is time to bring this litigation to an end. We hold that § 1427 ratified the eligibility determination that Stratman seeks to challenge, leaving us unable to grant Stratman's requested relief under ANCSA regardless of the merits of his claims. Because we lack jurisdiction to hear moot claims, *see Feldman v. Bomar*, 518 F.3d 637, 642 (9th Cir. 2008), we dismiss this appeal. *Id.* at 644. Each party shall bear his or its own costs on appeal.

## DISMISSED.

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<sup>5</sup>The foregoing analysis leads us to reject Stratman's contention that in order to conclude that ANCSA's eligibility requirements do not apply to Leisnoi, we must find that § 1427 repealed the relevant eligibility and enforcement provisions of ANCSA.

**APPENDIX B**

**United States District Court  
for the District of Alaska**

**Opinion**

**dated September 26, 2007**

## APPENDIX B - 1

### IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

OMAR STRATMAN,	)	Case No:
	)	3:02-cv-00290
Plaintiff,	)	(JKS)
	)	
vs.	)	<u>ORDER</u>
	)	
LEISNOI, INC.,	)	
KONIAG, INC., and	)	
DIRK KEMPTHORNE,	)	
Secretary of the	)	
Interior,	)	
	)	
Defendants.	)	
	)	

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### I - INTRODUCTION

This litigation has been festering now for over thirty years. It involves a challenge under the Administrative Procedure Act ("APA") to the 1974 certification of a Native village under the Alaska Native Claims Settlement Act ("ANCSA"). Plaintiff essentially argues that Woody Island did not qualify and should not have been certified as a Native village under ANSCA. Plaintiff seeks to have Leisnoi, Inc., the village corporation for Woody Island, stripped of the status and benefits conferred

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upon it under ANCSA.<sup>1</sup> Over ten years ago, this Court remanded this dispute to the Interior Board of Land Appeals ("IBLA") for a belated exhaustion of administrative remedies. The agency review has finally matured from the seed of remand to a final decision by the Secretary of the Interior concluding that Stratman's challenge was rendered moot by congressional action recognizing the village.

Stratman disagrees with the final disposition of his administrative sojourn and has returned to the Court seeking summary judgment setting aside the Secretary's original 1974 decision to certify Leisnoi.<sup>2</sup> Defendants meanwhile have been very busy filing seven separate motions to dismiss.<sup>3</sup>

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<sup>1</sup>The Secretary points out that the parties have lost sight of the distinction between Woody Island, the Native village entitled to ANCSA benefits, and Leisnoi, Inc., the village corporation which holds and manages the benefits. The Court will follow the Secretary's lead and use the term Leisnoi in all instances in order to avoid confusion.

<sup>2</sup>Docket Nos. 178 (Stratman mot.); 193 (Leisnoi mot. to stay); 197 (Stratman opp'n); 199 (Leisnoi reply); 205 (Koniag mot. to stay); 207 (Govt. mot. to stay); 217 (Stratman opp'n).

<sup>3</sup>Defendant Leisnoi has moved for dismissal on the basis of standing, statute of limitations, and res judicata. Docket Nos. 107 (Mot. re: standing); 162 and 167 (Stratman opp'n); 190 (Reply); 109 (Mot. re: statute of limitations); 162 (Stratman opp'n); 195 (Reply); 118 (Mot. re: res judicata); 162

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Leisnoi has requested oral argument on these motions to dismiss.<sup>4</sup> Koniag has filed a counterclaim alleging violations of a previous settlement agreement.<sup>5</sup> Finally, there are a handful of miscellaneous motions which the Court must address to clean up the docket.<sup>6</sup>

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and 168 (Stratman opp'n); 188 (Reply). Defendants Leisnoi and Koniag have both filed motions to dismiss, arguing mootness based on the Federally Recognized Indian Tribe Act. Docket Nos. 111 (Leisnoi mot.); 144 (Koniag mot.); 166 (Stratman opp'n); 191 (Leisnoi reply); 201 Koniag reply). They have also filed motions to dismiss arguing mootness based on ANCSA. Docket Nos. 120 (Leisnoi mot.); 143 (Koniag mot.); 149 (Govt. mem.), 171 (Stratman opp'n); 198 (Leisnoi reply); 210 (Koniag reply); 209 (Govt. reply).

<sup>4</sup>Docket Nos. 211 (Mot.); 216 (Response). The Court has considered this request. After a review of the record, it appears that the parties have sufficiently briefed the issues to the extent that oral argument will not be helpful. See D. Ak. LR 7.2(a)(3); *United States v. Cheely*, 814 F. Supp. 1430, 1436 n4 (D. Alaska 1992), aff'd, 36 F.3d 1439 (9th Cir. 1994).

<sup>5</sup>Docket Nos. 200 (Koniag answer and counterclaim); 218 (Stratman answer).

<sup>6</sup>Docket Nos. 177 (Stratman mot. for order compelling Govt. to file full administrative record); 192 (Leisnoi opp'n); 204 (Koniag opp'n); 208 (Govt. opp'n); 169 (Stratman mot. for leave to file excess pages); 189 (Leisnoi mot. for leave to file certain exhibits); 202 (Joint mot. By Koniag and Govt. for extension of time to file briefs).

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### II - BACKGROUND

The facts of this case have been set out on several occasions and are well known to the parties. *See, e.g. Stratman v. Watt*, 656 F.2d 1321 (9th Cir. 1981); *Leisnoi, Inc. v. Stratman*, 835 P.2d 1202 (Alaska 1992). The following facts, upon which the Secretary relied, are sufficient for purposes of this Order:

In 1974, the Secretary, on the basis of a determination by the BIA, certified Leisnoi as a Native village under ANCSA in the Koniag region of Alaska and then subsequently conveyed to Leisnoi the surface estate of approximately 160,000 acres of public lands that Leisnoi had selected in satisfaction of its aboriginal land claims. In accordance with the requirements of ANCSA, the subsurface estate of that acreage was conveyed to Koniag Regional Corporation (Koniag)...

In 1976, Omar Stratman (Stratman), a rancher with grazing leases in the area from which Leisnoi was entitled to select its land, sued in

## APPENDIX B - 5

Federal court challenging Leisnoi's status as a Native village eligible for ANCSA benefits. Stratman had not pursued his administrative remedies. The district court dismissed his action, concluding he lacked standing. In 1981, the Court of Appeals for the Ninth Circuit reversed the district court, finding that Stratman had standing based on his recreational interest, and reinstated Stratman's claim. The court also excused Stratman's failure to exhaust his administrative remedies because, as a lessor, he was entitled to, but did not, receive actual notice of Leisnoi's entitlement to the land.

In 1982, Stratman entered an agreement with Koniag with which Leisnoi had merged, to drop his litigation challenging Leisnoi's eligibility. The agreement failed, however, after Leisnoi's merger with Koniag was voided and Leisnoi repudiated the agreement in 1985. In 1994, the Ninth Circuit ordered Stratman's challenge to Leisnoi's eligibility reinstated.

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In 1995, the district court stayed the litigation. Noting that this appears to be the perfect case to read ripeness and primary jurisdiction together to require that Stratman litigate his challenge to Leisnoi before the agency before he brings it here, the court sent the case to IBLA for consideration of Stratman's challenge to Leisnoi. The court explained that [remand would] permit the exhaustion of administrative remedies, albeit belated, and give the Court the benefit of the agency's expertise...

The IBLA rendered its decision on October 29, 2002, three years after the recommended decision by the Administrative Law Judge. The IBLA concluded that it lacked subject matter jurisdiction of the case, but nonetheless reviewed and endorsed the Administrative Law Judge's recommended decision and prepared a written "analysis of the legal issues" for the benefit of the district court in obedience to its mandate.

Docket No. 96, Attach. 2 at 2-3 (internal quotation marks and citations omitted).

## APPENDIX B - 7

Although the IBLA decided it lacked jurisdiction, it adopted the Administrative Law Judge's findings, concluding that Leisnoi did not qualify as a Native village under ANCSA. See *Stratman v. Leisnoi, Inc.*, 157 IBLA 302, 319-20 (2002). Stratman filed this current case in 2002 seeking to have the IBLA decision translated into an order stripping Leisnoi of its status and benefits under ANCSA. See Docket No. 4. The Department of the Interior ("DOI") however was not finished with the dispute and the Court stayed proceedings pending a final decision by the Secretary of the Interior. Docket No. 34.

On December 20, 2006, the Secretary found the agency had jurisdiction and disapproved the decision of the IBLA, adopting as his final decision the reasoning, analysis and conclusions of a memorandum written by Solicitor Bernhardt. Docket No. 96, Attach. 1. The Secretary's decision concluded: (1) that the IBLA had jurisdiction over the case; (2) that 43 C.F.R. § 2651.2(a)(5) required the Secretary to review the IBLA decision; and (3) that section 1427 of ANILCA ratified the DOI's 1974 eligibility determination, thus mooting this case. Docket No. 96, Attach. 2 at 2-4. The Secretary's decision brought Stratman's belated administrative appeal to an end and marked the exhaustion of administrative remedies and the resumption of proceedings before this Court.

## APPENDIX B - 8

Plaintiff filed his Third Amended Complaint in February of 2007, essentially renewing his APA challenge to the Secretary's original 1974 decision to certify Leisnoi as an eligible ANCSA Native village. Docket No. 105. Plaintiff contends that the IBLA decision has superceded the Secretary's original 1974 decision and is now the final decision binding the parties and the Court. *Id.* at 11. Accordingly, Plaintiff seeks a judgment affirming the IBLA's decision and stripping Leisnoi of the status and benefits conferred upon it under ANCSA. *Id.*

Defendants Leisnoi and Koniag have filed motions to dismiss arguing that congressional ratification of Leisnoi's status has mooted this controversy. Docket Nos. 120 (Leisnoi mot.); 121 (Leisnoi mem.); 143 (Koniag mot.); 145 (Koniag mem.); 171 (Stratman opp'n); 198 (Leisnoi reply); 210 (Koniag reply). The Government has filed a memorandum and a reply discussing the merits of the issue. See Docket Nos. 149 (Govt. mem.); 209 (Govt. reply). The Court reviews both motions to dismiss for lack of subject matter jurisdiction under rule 12(b)(1) of the Federal Rules of Civil Procedure.

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### III - STANDARD OF REVIEW

Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a defendant may seek to dismiss a complaint for "lack of jurisdiction over the subject matter." Fed. R. Civ. P. 12(b)(1). When considering a Rule 12(b)(1) motion, the Court is not restricted to the face of the pleadings, but may review any evidence, such as declarations and testimony, to resolve any factual disputes concerning the existence of jurisdiction. See *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988). The burden of proof on a Rule 12(b)(1) motion is on the party asserting jurisdiction. See *Sopcak v. N. Mountain Helicopter Serv.*, 52 F.3d 817, 818 (9th Cir. 1995). A reviewing court must presume a lack of jurisdiction until the plaintiff establishes otherwise. See *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A complaint will be dismissed for lack of subject matter jurisdiction (1) if the case does not "arise under" any federal law or the United States Constitution, (2) if there is no case or controversy within the meaning of that constitutional term, or (3) if the cause is not one described by any jurisdictional statute. See *Baker v. Carr*, 369 U.S. 186, 198 (1962).

Federal courts lack subject matter jurisdiction to adjudicate moot issues: "no justiciable controversy is presented ... when the

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question sought to be adjudicated has been mooted by subsequent developments." *Flast v. Cohen*, 392 U.S. 83, 95 (1968). The Ninth Circuit has found that "to avoid mootness, the court must determine that the issues in a case remain live and that the parties continue to have a legally cognizable interest in the outcome throughout the proceeding." *So. Oregon Barter Fair v. Jackson County*, 372 F.3d 1128, 1133 (9th Cir. 2004) (citing *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000)). Congressional ratification can render moot a live controversy. See *Equal Employ. Opport. Commission v. First Citizens Bank of Billings*, 758 F.2d 397, 399-400 (9th Cir. 1985).

## IV - DISCUSSION

Section 1427 of ANILCA instructs the Secretary of the Interior to "convey...the surface estate of all of the public lands on Afognak Island" to a joint venture comprised of the "Koniag Deficiency Village Corporations." Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, § 1427(b)(1), (c), 94 Stat. 2371, 2519-23 (1980). Leisnoi is specifically enumerated as one of the Koniag deficiency village corporations. *Id.* at § 1427(a)(4). The conveyance was to be made "in full satisfaction" of, among other things, "the right of each Koniag Deficiency Village Corporation to conveyance under [ANCSA] of the surface estate of

## APPENDIX B - 11

deficiency village acreage on the Alaska Peninsula." *Id.* at § 1427(b)(l).

Defendants argue that section 1427 of ANILCA ratified the Secretary's 1974 certification of Leisnoi as a Native village eligible for benefits under ANCSA, consequently rendering moot Stratman's claim that the 1974 certification was arbitrary and capricious. *See Docket Nos. 121 at 8; 145 at 4-9; 149 at 1.* They further argue that the Secretary's interpretation supporting their contention is due deference under *Chevron*, or *Skidmore* in the alternative. Stratman argues that no deference is due, and that section 1427 cannot be read as ratifying Leisnoi's eligibility, or as exempting Leisnoi from the threshold requirements for certification as a Native village. *See Docket No. 171 at 6-51.*

### **A. The Secretary's Interpretation of Section 1427 is Entitled to Deference**

In this case, the question of mootness turns on interpretation of section 1427 of ANILCA. Defendants argue that the Secretary's interpretation of section 1427 of ANILCA is due deference under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) or alternatively *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

## APPENDIX B - 12

In reviewing an agency's interpretation of a statute the agency administers, a court first looks to see whether "Congress has directly spoken on the precise question." *Chevron U.S.A.*, 467 U.S. at 843. If Congress has not addressed the specific issue, or if the statute is ambiguous, the question is whether the agency's interpretation is permissible. *Id.* Courts accord great deference to the interpretation of a statute by the agency or agencies entrusted with its implementation, and will uphold the agency interpretation so long as it is reasonable. *Kunaknana v. Clark*, 742 F.2d 1145, 1150 (9th Cir. 1984). To satisfy the reasonableness standard it is not necessary for the court to find that the agency's construction of the statute is the only reasonable interpretation, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. *Id.* Rather, the agency interpretation must merely be within the range of reasonable meanings which the words of the statute permit. See *Id.* at 1152.

In determining whether to apply *Chevron* deference, this Court looks to *United States v. Mead Corp.*, 533 U.S. 218 (2001). In *Mead*, the Supreme Court wrote that such deference is appropriate when circumstances imply that Congress expects the "agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law." *Id.* at 229. The authority to engage in formal

## APPENDIX B - 13

rulemaking or adjudication is a solid indicator of when the authority to speak with the force of law exists. *Id.*

The Ninth Circuit has repeatedly accorded great deference to the Department of the Interior's interpretation of ANCSA. See *Chugach Alaska Corp. v. Lujan*, 915 F.2d 454,457 (9th Cir. 1990) (accordng deference to agency's interpretation of ANCSA eligibility requirements); *Seldovia Native Ass 'n, Inc., v. Lujan*, 904 F.2d 1335, 1342 (9th Cir. 1990); *Haynes v. United States*, 891 F.2d 235, 238-39 (9th Cir. 1989). Similarly, courts have found that the DOI deserves *Chevron* deference in its interpretation of ANILCA. See *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1191 (9th Cir. 2000); *Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995); *Native Village of Quinhagak v. United States*, 35 F.3d 388, 392 (9th Cir. 1994).

Here, the Secretary of the Interior has interpreted the intersection of section 1427 of ANILCA with the village eligibility requirements of ANCSA. ANILCA makes the relationship clear, placing section 1427 under Title XIV of ANILCA which is entitled "Amendments to the Alaska Native Claims Settlement Act and Related Provisions." See ANILCA Title XIV, 94 Stat. 2491. Further, section 1427 specifically names the

## APPENDIX B - 14

Secretary of the Interior as the government actor who must implement the provisions of the section. ANILCA § 1427(b)(1). The Court is satisfied that Congress expected the DOI to speak with the force of law in resolving ambiguities contained within ANILCA generally, and section 1427 specifically.

Under the first prong of *Chevron*, the provision interpreted by the agency must be ambiguous. *Chevron U.S.A.*, 467 U.S. at 843. Stratman argues that the Secretary's interpretation is simply not ambiguous after applying canons of construction. Docket No. 171 at 51-52. As this Court has stated in the past, the question of whether ANILCA ratified Leisnoi's eligibility is a difficult question. The Secretary demonstrates in his opinion that because Leisnoi's status was under judicial review at the time ANILCA was passed, it is unclear whether Congress intended section 1427(b)(1) as a ratification of Leisnoi's eligibility, or simply as an acknowledgment that Leisnoi had an entitlement to certain acreage if Stratman's challenge were unsuccessful. See Docket No. 96, Attach. 2 at 10. Subsection (a)(2) posed a similar ambiguity because Congress appeared to be stating that Leisnoi was entitled to benefits under ANCSA section 14(a), but the eligibility determination was still under review. *Id.* The differences in opinion on this issue between the IBLA and the Secretary further highlight the ambiguity involved. See

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Docket No. 96, Attach. 2 at 5-13. The Court is satisfied that it was not clear on the face of section 1427 whether Congress intended to ratify Leisnoi's eligibility under ANCSA.

Under the second prong of Chevron, the Secretary's conclusion that section 1427 ratified the original 1974 eligibility decision must be reasonable. *See Chevron U.S.A.*, 467 U.S. at 843. The Court finds the Secretary's interpretation of section 1427 not only reasonable, but persuasive.

First, the Secretary based his interpretation on the time-honored canon of reading a statute as a whole. *See Docket No. 96, Attach. 2 at 10; Washington State Dep't of Soc. and Health Servs. v. Keffeler*, 537 U.S. 371,384 n.7 (2003). Read as a whole, the Court agrees that certainty about the status of Leisnoi was a necessary predicate to achieving the finality sought broadly by ANILCA across Alaska, and narrowly by section 1427 in the Koniag region. *See Docket No. 96, Attach. 2 at 6-10.*

Second, the Secretary applied the canon of statutory construction that "remedial legislation should be construed broadly to effectuate its purposes." *Id.* at 11 (*quoting Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967)). Keeping in mind the

## APPENDIX B - 16

background of ANCSA and the specific problems of land selection in the Koniag region, it is more than reasonable to conclude that settling Leisnoi's eligibility was a necessary predicate to effectuating Congress' purpose of settling Koniag's land entitlement quickly and permanently. See Docket No. 96, Attach. 2 at 6-11.

Third, the Secretary looked to the legislative history and demonstrated that Congress was aware of the doubts as to Leisnoi's eligibility at the time it passed section 1427. *Id.* at 11-12. The Secretary's conclusion that awareness implies ratification is bolstered by the fact that Congress dealt separately in section 1427 with other villages whose eligibility was less certain by offering them diminished benefits in settlement of their claims. See ANILCA § 1427(e). If Congress went to all the trouble to settle the status of these other villages, why would Congress leave Leisnoi's status up to the courts when bringing finality to the land selection process was one of Congress' chief aims in ANILCA?

The Court concludes that the Secretary's interpretation was not only permissible, but persuasive. Although the Court finds that the Secretary's interpretation must be upheld under *Chevron* deference, the Court notes that it would have come to the same conclusion had it been

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interpreting the statute in the first instance, or under the persuasive deference standard found in *Skidmore*.

### B. Ratification Moots Stratman's Claim

Stratman's challenge is to the Secretary's 1974 certification of Leisnoi's eligibility for enacted ANCSA benefits. The Court has concluded that Congress ratified the Secretary's decision when it enacted section 1427 of ANILCA. It therefore no longer matters whether the Secretary's original decision was flawless or arbitrary and capricious. With section 1427, Congress effectively decided to overlook any doubts as to Leisnoi's eligibility or shortcomings in the Secretary's 1974 determination in order to settle the land selection process in the Koniag region with finality. Stratman's challenge to the original determination is therefore moot. Regardless of the merits of his central contention, the political branches are now his only recourse.

### IT IS THEREFORE ORDERED:

Stratman's challenge to Leisnoi's eligibility is moot. As this Court lacks subject matter jurisdiction, the Motion to dismiss at **Docket No. 120** is **GRANTED**. The Motion for extension of time at **Docket No. 202** is **GRANTED**. The

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Motion for leave to file excess pages at **Docket No. 169** is **GRANTED**. The Motion for oral argument at **Docket No. 211** is **DENIED** as noted *supra*. The Motions at **Docket Nos. 107; 109; 111; 118; 143; 144; 177; 178; 189; 193; 205; and 207** are **DENIED** as they are now moot. Koniag's Counterclaim at **Docket No. 200** is also **DISMISSED** as it is now moot.

Dated this 26th day of September 2007.

/s/ James K. Singleton, Jr.

JAMES K. SINGLETON, JR.

United States District Judge

**APPENDIX C**

**Decision of the Secretary  
of the Interior**

**dated December 20, 2006**

## APPENDIX C - 1

U.S. DEPARTMENT OF THE INTERIOR  
MARCH 3, 1849

THE SECRETARY OF THE INTERIOR  
WASHINGTON  
DEC 20 2006

IN RE APPEAL OF LEISNOI, )	Decision
INC. FROM DECISION OF )	
INTERIOR BOARD OF )	Docket No.
LAND APPEALS )	157-IBLA-
)	302
)	
)	Date:

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### Decision

Review of the Decision of the Interior Board of Land Appeals ("IBLA"), 157 IBLA 302 (October 29, 2002), concerning the certification of Leisnoi, Inc. ("Leisnoi") as a Village eligible for benefits under the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. § 1601-1624.

APPEARANCES: John R. Fitzgerald, Esq., and Roy S. Jones, Esq., on behalf of Appellant Leisnoi; Michael J. Schneider, Esq., on behalf of Appellee

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Stratman; James R. Mothershead, Esq., on behalf of Intervenor Bureau of Indian Affairs; R. Collin Middleton, Esq., and Brennan P. Cain, Esq., on behalf of Intervenor Koniag, Inc.

I adopt the reasoning, analysis and conclusions of the Solicitor's memorandum to me (attached), and therefore disapprove the decision of the IBLA dated October 29, 2002.

/s/ DIRK KEMPTHORNE, SECRETARY

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## APPENDIX C - 3

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On behalf of Intervenor Bureau of Indian Affairs

## APPENDIX C - 4

U.S. DEPARTMENT OF THE INTERIOR  
MARCH 3, 1849

United States Department of the Interior  
OFFICE OF THE SOLICITOR

December 11 2006  
Memorandum

To: Dick Kempthorne  
Secretary

Through: David Bernhardt  
Solicitor  
s/ David Bernhardt

From: Lawrence Jensen  
Deputy Solicitor  
s/ Lawrence Jensen

Subject: *Stratman v. Leisnoi*

This memorandum presents my analysis and recommendation in the case of *Stratman v. Leisnoi*, which was initiated 30 years ago and which has most recently been the subject of a 2002 decision by the Interior Board of Land Appeals (IBLA) following a 1995 remand from the Federal District Court for Alaska.

## APPENDIX C - 5

The case involves a challenge to a 1974 determination by the Bureau of Indian Affairs (BIA), which was then certified by the Secretary, that Woody Island is a Native village for purposes of the Alaska Native Claims Settlement Act (ANCSA) and was therefore eligible to have conveyed to its Native village corporation, Leisnoi, Inc. (Leisnoi)<sup>1</sup> a specified amount of public land in Alaska in satisfaction of its aboriginal land claims.

Following the 1995 remand, an Administrative Law Judge, at the direction of IBLA, held a two week hearing on the eligibility issue at which over 40 witnesses testified. In his recommended decision, he concluded that Leisnoi was not a Native village for purposes of ANCSA. The IBLA, after reviewing the recommended decision, found no reason to alter the Administrative Law Judge's findings, and conclusions. The IBLA also concluded, as a matter of law, that a statute passed subsequent to ANCSA in 1980, section 1427 of the Alaska Native Interest

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<sup>1</sup>The materials cited below lose sight of the distinction between Woody Island, as the Native village, which is the entity that is eligible for ANCSA benefits, and Leisnoi, as its Native village corporation, which is the entity which selects the lands for which the village is eligible and to which the lands are conveyed. As a result, they sometimes refer to Leisnoi even when the reference should be to Woody Island. To avoid confusion, I will use the term Leisnoi in all instances.

## APPENDIX C - 6

Lands Conservation Act (ANILCA), was not a congressional ratification of the Department's 1974 eligibility determination.

Leisnoi has asked that you exercise your discretion to review the IBLA's decision.

For the reasons explained below, I conclude that:

- 1) your review of IBLA's decision is mandatory pursuant to 43 C.F.R. § 2651.2(a)(5); and
- 2) section 1427 of ANILCA did ratify the Department's 1974 eligibility determination, thus mooted the case.

I therefore recommend that you disapprove the IBLA's decision. If you concur with my conclusion that section 1427 ratified the Department's 1974 eligibility determination, and thereby mooted the case, it will not be necessary for you to review the factual findings of the Administrative Law Judge that were made 25 years after the original determination.

### I. Background

In 1974, the Secretary, on the basis of a determination by the BIA, certified Leisnoi as a

## APPENDIX C - 7

Native village under ANCSA in the Koniag region of Alaska<sup>2</sup> (Tab 1) and then subsequently conveyed to Leisnoi the surface estate of approximately 160,000 acres of public lands that Leisnoi had selected in satisfaction of its aboriginal land claims. In accordance with the requirements of ANCSA, the subsurface estate of that acreage was conveyed to Koniag Regional Corporation (Koniag). In 2002, in a lawsuit separate from the one at issue here, the Ninth Circuit Court of Appeals affirmed a district court decision quieting Leisnoi's title to a portion of the lands that had been conveyed to it,<sup>3</sup> based on a disclaimer of any interest in the lands by the United States. *Leisnoi, Inc. v. United States*, 313 F.3d 1181 (9<sup>th</sup> Cir. 2002).

In 1976, Omar Stratman (Stratman), a rancher with grazing leases in the area from which

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<sup>2</sup>A village was eligible if it was listed in ANCSA and found to have at least 25 residents as of April 1, 1970, was not "of a modern or urban character" and a majority of its residents were Native. 43 U.S.C. § 1610(b). If Congress did not list a village, it could still be found eligible if it petitioned the Secretary and the Secretary found it satisfied the same criteria. *Id.* Leisnoi was not listed by Congress but petitioned the Secretary for certification as an eligible village. Stratman claimed that Leisnoi did not have 25 residents as of April 1, 1970.

<sup>3</sup>Leisnoi brought the action to quiet title to lands that it sought to sell only. The action did not concern all of Leisnoi's lands.

## APPENDIX C - 8

Leisnoi was entitled to select its land, sued in Federal court challenging Leisnoi's status as a Native village eligible for ANCSA benefits.<sup>4</sup> Stratman had not pursued his administrative remedies. The district court dismissed his action, concluding he lacked standing. *Stratman v. Andrus*, 472 F. Supp. 1172 (D. Alaska 1979). In 1981, the Court of Appeals for the Ninth Circuit reversed the district court, finding that Stratman had standing based on his recreational interests, and reinstated Stratman's claim. The court also excused Stratman's failure to exhaust his administrative remedies because, as a lessor, he was entitled to, but did not, receive actual notice of Leisnoi's entitlement to the land. *Stratman v. Watt*, 656 F.2d 1321 (9<sup>th</sup> Cir. 1981). (Tab 2).

In 1982, Stratman entered an agreement with Koniag, with which Leisnoi had merged, to drop his litigation challenging Leisnoi's eligibility. The agreement failed, however, after Leisnoi's merger with Koniag was voided and Leisnoi repudiated the agreement in 1985. In 1994, the Ninth Circuit ordered Stratman's challenge to Leisnoi's eligibility reinstated. *Stratman v. Babbitt* 1994 U.S. App. LEXIS 34354 (9<sup>th</sup> Cir. Dec. 5, 1994). (Tab 3).

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<sup>4</sup>It is worth noting that Leisnoi ultimately selected its lands from acreage that was not encumbered by Stratman's leases.

## APPENDIX C - 9

In 1995, the district court stayed the litigation. Noting that "this appears to be the perfect case to read ripeness and primary jurisdiction together to require that Stratman litigate his challenge to Leisnoi before the agency before he brings it here," the court sent the case to IBLA "for consideration of Stratman's challenge to Leisnoi." *Stratman v. Babbitt*, (D. Alaska 1995) A76-132 CV (JKS) at 2. (Tab 4). The court explained that "that course will permit the exhaustion of administrative remedies, albeit belated, and give the Court the benefit of the agency's expertise and the agency the benefit of any intervening action by Congress" i.e., the possible ratification by Congress in section 1427 of the 1974 eligibility determination. The district court stated:

Sending the issue back will permit the agency to exercise its expertise. If there is a reasonable basis for the Secretary's action, taking into account the limited time Congress allowed him to make that determination, his action will be upheld. If, despite the leeway he must be given, the Secretary did certify a phantom village, the agency is the best place for the determination to be made.

*Id.*

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The IBLA rendered its decision on October 29, 2002, three years after the recommended decision by the Administrative Law Judge. *Stratman v. Leisnoi*, 157 IBLA 302 (2002). (Tab 5). The IBLA concluded that it lacked subject matter jurisdiction of the case, but nonetheless reviewed and endorsed the Administrative Law Judge's recommended decision and prepared a written "analysis of the legal issues" for the benefit of the district court in obedience to its mandate.

### II. The IBLA's Jurisdiction

For the reasons explained below, IBLA erred in concluding that it lacked subject matter jurisdiction. This issue is important because it bears on the question of whether you are required to review the IBLA's decision, or need do so only as an exercise of your discretion.

The IBLA reasoned, in essence, as follows: Following its certification as an ANCSA village, Leisnoi selected the land for which it was eligible under ANCSA. The Secretary then conveyed the selected lands to Leisnoi by patent and interim conveyance in 1986. "The effect of the issuance of a patent by the United States is to transfer the legal title from the United States and to remove from the jurisdiction of the Department the consideration of all disputed questions concerning the rights to [the patented] lands," including a challenge to the

## APPENDIX C - 11

eligibility determination on the basis of which the patents were issued. *Id.* at 311. Moreover, the patents and interim conveyances to Leisnoi "were all made more than six years ago and title to that land has been quieted in Leisnoi." *Id.* at 311-312. "Such facts bring into play the limitation against the United States [of the applicable statute of limitations] and bar Departmental involvement at any level, regardless of the possible merits of Stratman's challenge." *Id.* Because "the court cannot vest IBLA with jurisdiction it does not have," the IBLA has "no authority to entertain Stratman's challenge to [Leisnoi's] eligibility" to select lands under ANCSA." *Id.*

BLM has informed me, however, that Leisnoi has not received all of the acreage for which it is eligible under ANCSA. Leisnoi has the right to select approximately 3,000 additional acres. Because Leisnoi may be eligible for additional acreage, jurisdiction to address the underlying question of Leisnoi's eligibility has not "been removed from the Department," and the statute of limitations, at least as to those lands, does not "bar Departmental involvement."

Second, the IBLA erred in concluding that its decision was not subject to 43 C.F.R. § 2651.2(a)(5), which requires that all decisions on village eligibility appeals be approved by the Secretary before becoming final. *Id.* at 320 n. 16. The IBLA

## APPENDIX C - 12

reasoned, in essence, as follows: The IBLA typically decides appeals of parties adversely affected "by a decision of an agency official" other than the Secretary. *Id.* at 309. There is "no agency decision for direct review" here because "all the agency decisions in this case issued over 25 years ago," and were decided "with administrative finality in 1974" by the Secretary. *Id.* at 310. The case "has found its way to [IBLA] through a referral" from the district court, rather than by way of administrative appeal, and the IBLA is therefore not "issuing a decision on a village eligibility appeal." *Id.* at 310, 320 n. 16. As 43 C.F.R. § 2651.2(a)(5) applies only to decisions on village eligibility appeals, the IBLA's decision need not be "personally approved by the Secretary" before becoming final.

The district court, however, explicitly sent the case back to IBLA "for consideration of Stratman's challenge to Leisnoi," and to "permit exhaustion of administrative remedies, albeit belated." *Stratman v. Babbitt*, A76-132 CV (JKS) at 3. The only remedy available to Stratman in 1974 (had he chosen to seek it then) was a review by the IBLA's predecessor of the BIA's eligibility determination. While this case is in a decidedly unusual procedural posture after 30 years of litigation, it is clear that the district court expected the IBLA to review the original eligibility determination and, "taking into account the limited time Congress allowed [the Secretary] for making the determination," decide

## APPENDIX C - 13

whether there was "a reasonable basis for the Secretary's action."<sup>5</sup> *Id.* at 2. It appears that the court, in effect, suspended the Secretary's certification of the BIA's eligibility determination pending the outcome of the IBLA's review. I thus conclude that the IBLA was, in fact, issuing a decision on a village eligibility appeal, and that you therefore have mandatory jurisdiction under 43 C.F.R. § 2651.2(a)(5).

### III. Section 1427 of ANILCA (Tab 6)

In 1980, nine years after ANCSA was passed, Congress, in section 1427 of ANILCA, directed the Secretary to convey "the surface estate of all of the lands on Afognak Island," with certain exceptions, to a joint venture consisting of "the Koniag Deficiency Village Corporations, the Koniag 12(b) Village Corporations and Koniag." § 1427(c). The conveyance was to be made, among other things, "in full satisfaction" of "the right of each Koniag Deficiency Village Corporation to conveyance" under ANCSA "of the surface estate of deficiency village acreage on the Alaska peninsula." Section 1427(b)(1). Leisnoi was listed in section 1427(a)(4)

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<sup>5</sup>Rather than review the BIA's determination to determine if it had a reasonable oasis, given the time constraints imposed by ANCSA, the IBLA directed the Administrative Law Judge to hold a *de novo* hearing which lasted two weeks.

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as a "Koniag Deficiency Village." The "deficiency village acreage on the Alaska peninsula," Leisnoi's right to which was to be satisfied out of the conveyance of "the surface estate of ... lands on Afognak Island," was defined as "the aggregate number of acres of public land to which 'Koniag deficiency village corporations' are entitled, under section 14(a) of [ANCSA], to a conveyance of the surface estate on Kodiak Island." Section 1427(a)(2).

Because section 1427(a)(4) lists Leisnoi as a Koniag Deficiency Village Corporation and then describes such corporations in subsection (a)(2) as "entitled, under section 14(a) of [ANCSA], to a conveyance" of certain lands, and because section 1427 directs that certain lands on Afognak Island be conveyed "in full satisfaction" of Leisnoi's entitlement, Leisnoi, Koniag and the BIA have argued that section 1427 ratified Leisnoi's status as an eligible Native village under ANCSA and thus mooted Stratman's challenge to Leisnoi's eligibility.

In its 1995 remand order, the district court denied motions for summary judgment by Leisnoi and Koniag on the section 1427 issue. The court noted that this was "a difficult question that should be decided in the first instance by the agency." *Stratman v. Babbitt* at 2. On remand, the IBLA characterized "the legal issue referred to" it by the district court as "whether [Leisnoi's] status as a Native village [under ANCSA] has been ratified by

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Congress." *Stratman v. Leisnoi*, 157 IBLA at 312.

After reviewing the issue, the IBLA concluded that "the listing of Leisnoi in section 1427(a)(4) and its entitlement to lands on Afognak was not a ratification of its eligibility as a Native village." *Id.* at 313. However, in doing so, the IBLA failed to analyze all of the relevant language in section 1427. Moreover, none of the three reasons that IBLA did give for its conclusion is persuasive, particularly when viewed against the background of the relevant statutory language.

Before discussing the language of section 1427 and the IBLA's reasons for concluding that there was no ratification, it is necessary to review the provisions of ANCSA that prompted the enactment of section 1427 and that led to the problems it was intended to solve. Section 1427 cannot be understood outside of this ANCSA context.

### A. ANCSA

ANCSA was intended to provide "a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims." 43 U.S.C. § 1601(a). It was to accomplish that purpose "rapidly" and "with certainty," and "without litigation," 43 U.S.C. § 1601(b), by, among other things, conveying public lands to Native

## APPENDIX C - 16

villages and Native regional corporations that had been certified or established pursuant to the Act. In settlement of their land claims, the Native villages were to receive the surface estate of a specified number of public lands selected by them, and the regional corporations were to receive, among other things, the subsurface estate lying below the acres conveyed to the Native villages that were located within their geographic boundaries. 43 U.S.C. § 1613(f).

ANCSA listed many villages which would be eligible for its benefits, provided the Secretary determined that they met certain criteria. ANCSA also provided that villages that were not listed in the Act, like Leisnoi, could petition the Secretary for a determination of eligibility. 43 U.S.C. § 1610(b)(3). Leisnoi filed such a petition and, based on a determination by the BlA, the Secretary certified it as an eligible ANCSA Native village.

By its terms, ANCSA withdrew certain public lands in the vicinity of each eligible Native village from the operations of the public land laws. 43 U.S.C. § 1610(a)(1). The Native village was then entitled to select the lands it was to receive in settlement from those withdrawn lands. In the case of Leisnoi and several other Native villages within the Koniag region, the land withdrawn for this purpose was on Kodiak Island.

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ANCSA provided further that where there was not enough land in the initial withdrawal to satisfy a village's selection rights, the Secretary was to "withdraw three times the deficiency from the nearest unreserved, vacant and unappropriated public lands." 43 U.S.C. § 1610(a)(3). This land is known as "deficiency village acreage," and was to be available to satisfy the Native villages' selection rights. In the case of the Koniag villages, including Leisnoi, the deficiency village acreage that was withdrawn, and from which they were to complete their land selection, was on the Alaska Peninsula.

As ANCSA was implemented, two problems cropped up in the Koniag region that were preventing a "rapid" and "certain" settlement of the Native claims there.<sup>6</sup> First, for reasons not

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<sup>6</sup>The complexity of ANCSA's scheme for determining the land entitlements of the regional and village corporations resulted in substantial litigation over a wide variety of issues and delayed conveying land titles to the corporations. Six years after ANCSA was enacted it was estimated that the regional corporations had received only 20 percent of their entitlement and the villages had received only 7 percent. At the time, the Department was estimating that it would take another 6 to 13 years to convey the land. Report by the Comptroller General: Land Title Should Be Conveyed To Alaska Natives Faster, 6 (B-108439; CED-78-130)(General Accounting Office, June 21, 1978). After reviewing the problem of the delays in the conveyancing and the effects of the delay on the corporations and the settlement, the Comptroller General recommended the Department analyze how to minimize litigation. *Id.* at 33-40.

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important here, the deficiency village acreage available on the Alaska Peninsula was unsatisfactory to the Koniag villages, and, in addition, the federal government was anxious to add the withdrawn lands on the Alaska Peninsula to the Alaska Peninsula National Wildlife Refuge. Second, a court had overturned the Secretary's determination that seven of the villages in the Koniag region were ineligible for ANCSA benefits, and had remanded the determinations to the Department for further proceedings, thus leaving uncertain until the conclusion of those proceedings the ultimate land entitlement of the Koniag Native villages and of Koniag itself.

To address these problems, Koniag and its villages proposed a comprehensive settlement, which was enacted into law as section 1427 of ANILCA. Section 1427, which was known as the Koniag Amendment, solved the two problems as follows. First, to satisfy the rights of the villages to deficiency acreage, it directed the Secretary to convey lands on Afognak Island to a joint venture consisting, among others, of the Koniag Deficiency Village Corporations, which included Leisnoi. Second, to resolve the eligibility of the seven villages, it deemed them eligible as a matter of law for ANCSA benefits in return for a release by them of all their claims under ANCSA and the conveyance to them of a significantly smaller amount of acreage than they would have been

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entitled to select under ANCSA.

Against this background, it is now possible to examine the language of section 1427 and the reasoning of the IBLA with respect to the question of congressional ratification of Leisnoi's eligibility.

### B. The language of section 1427

The principal defect in the IBLA's analysis of the ratification issue is its failure to closely examine all of the relevant language in section 1427. There are several parts of section 1427, other than those cited by the IBLA, that require review in an effort to determine congressional intent.

As is readily apparent from the recitation below, section 1427 constructs an elaborate scheme for the resolution of the Koniag land claims, not just of Leisnoi, but of a sizable number of other entities. In that scheme, in which Leisnoi's eligibility is clearly assumed, certainty about the eligibility of Leisnoi is a necessary predicate to the final and timely settlement of the claims of Leisnoi, the other Koniag villages, Koniag regional corporation and, to a lesser degree, all of the other Native villages and regional corporations entitled to ANCSA benefits. Viewing the scheme as a whole, it is reasonable to conclude that Congress intended to resolve all of the uncertainties and did not intend to leave the parties at risk of having their entitlements upset by a

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judicial resolution of Stratman's challenge to Leisnoi's eligibility.

The relevant language in section 1427 is as follows:

Subsection (a)(7) defines "Koniag village" as "a Native village under [ANCSA] which is within the Koniag region." At the time section 1427 was passed, Leisnoi had been determined to be such a village.

Subsection (a)(8) defines "Koniag Village Corporation" as "a corporation formed under section 8 of [ANCSA] to represent the Natives of a Koniag village ...." At the time section 1427 was passed, Leisnoi was such a corporation.

Subsection (a)(4) defines Leisnoi, along with three other Native Village corporations, as a "Koniag deficiency village corporation." Leisnoi was a "deficiency village corporation" because there was not enough land in its immediate vicinity on Kodiak Island to satisfy its entitlement under ANCSA. It was therefore entitled under ANCSA to select deficiency acreage--the difference between its entitlement and the land it had selected on Kodiak Island--from acreage set aside on the Alaska Peninsula.

Subsection (a)(5) defines Leisnoi as a "Koniag 12(b) Village Corporation," provided that, "within sixty

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days of the effective date of this Act, Koniag, Incorporated, by a resolution duly adopted by its Board of Directors, designates [all four of the Koniag deficiency village corporations] as such as a class." 12(b) is a provision in ANCSA that requires "the difference between twenty-two million acres and the total acreage selected by Village Corporations" to "be allocated ... among the eleven Regional Corporations," and then reallocated by each such regional corporation "on an equitable basis" among the Native villages within the region. 43 U.S.C. § 1611(b). Thus, Leisnoi's status was key to a final determination of the entitlements of every entity entitled to ANCSA benefits.

Subsections (b )(1) and (c ) then direct the Secretary to convey "the surface estate of all of the [specified] public lands on Afognak Island" "to a joint venture providing for the development of the [conveyed] surface estate on Afognak Island" and "consisting of the Koniag Deficiency Village Corporations, the Koniag 12(b) Village Corporations and Koniag, Incorporated."

Subsection (c) requires the joint venture to be one in which, among other things:

the share of the Koniag Deficiency Village Corporations as a class in the costs and revenues of such joint venture is determined on the basis of a fraction, the numerator of

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which is the deficiency village acreage on the Alaska Peninsula and the denominator is the sum of the deficiency village acreage on the Alaska Peninsula plus the 12(b) acreage on the Alaska Peninsula plus the Koniag 14(h) acreage on the Alaska Peninsula, which fraction shall be multiplied by the number of acres on Afognak Island to be conveyed by reason of subparagraph (b)(1) of this subsection ... [and in which] each Koniag Deficiency Village Corporation shall participate in the share of the Koniag Deficiency Village Corporations as a class in the ratio that the entitlement of each to deficiency village acreage on the Alaska Peninsula bears to the total deficiency village acreage on the Alaska Peninsula ...

Thus, Leisnoi's status was key to the proper sharing of costs and revenues of the joint venture to which the lands on Afognak Island were to be conveyed.

Subsection (c) also requires "the conveyance of Afognak Island lands to be "made as soon as practicable after there has been filed with the Secretary of the Interior a duly executed joint venture agreement with provisions for sharing of and entitlements in costs and revenues of such venture" as specified above. No provision is made for the conveyances to await the final outcome of Stratman's challenge to Leisnoi's eligibility.

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Subsection (b)(1) specifies that the conveyance is to be made "in full satisfaction" of, among other things, "the right of each Koniag Deficiency Village Corporation to conveyance under [ANCSA] of the surface estate of deficiency village acreage on the Alaska Peninsula" and "the right of each Koniag 12(b) Village Corporation to conveyance under [ANCSA] of surface estate of 12(b) acreage on the Alaska Peninsula."

As a "condition precedent" to the conveyance, subsection (b)(4) requires that "each Koniag Deficiency Village-Corporation and each Koniag 12(b) Village Corporation ... shall file with the Secretary of the Interior resolutions duly adopted by their respective boards of directors accepting the conveyances ... as being in full satisfaction of their respective entitlements to conveyances of ... deficiency village acreage on the Alaska Peninsula and of 12(b) acreage on the Alaska Peninsula."

Subsection (a)(2) defines "deficiency village acreage on the Alaska Peninsula" as "the aggregate number of acres of public land to which 'Koniag deficiency Village Corporations' are entitled, under section 14(a) of [ANCSA], to a conveyance of the surface estate on account of deficiencies in available lands on Kodiak Island."

These provisions in section 1427, while complex, are, with arguably two exceptions, quite

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clear. They require the Secretary, upon the completion of certain specified acts, to convey specified lands on Afognak Island to a particular joint venture that included Leisnoi in full satisfaction of the rights under ANCSA of certain of the joint venture partners, including Leisnoi, to, among other things, deficiency village acreage and 12(b) acreage on the Alaska Peninsula.

The only possible ambiguity is found in subsections (b)(1) and (a)(2). Subsection (b)(1), as noted above, provides that the conveyance of Afognak Island lands is "in full satisfaction" of, among other things, "the right of each Koniag Deficiency Village Corporation to conveyance under [ANCSA] of the surface estate of deficiency village acreage on the Alaska Peninsula." On its face, this language can be read as a congressional affirmation or declaration that Leisnoi, as a Koniag Deficiency Village Corporation, has a right to the conveyance of certain lands under ANCSA and that the conveyance of Afognak Island lands will fully satisfy that right. However, under ANCSA, the right of Leisnoi to a conveyance of lands is dependent on a determination by the Secretary that the Native village whose natives the corporation was formed to represent is a Native village for purposes of ANCSA. As there was a pending judicial challenge with respect to Leisnoi's status as a Native village at the time section 1427 was passed, the following question arises: Did Congress

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in subsection (b)(1) ratify (accept as final) the Secretary's eligibility determination, thus mootng the pending judicial challenge, or was Congress simply acknowledging that, pending the outcome of the judicial challenge, Leisnoi had a right to certain acreage, based on the 1974 determination by the Secretary?

A similar question is posed by the language of subsection (a)(2). It defines Leisnoi as a corporation "entitled, under section 14(a) of [ANCSA] to a conveyance of the surface estate on account of deficiencies in available lands on Kodiak Island." On its face, this language, like the language in (b)(1), can be read as a congressional affirmation or declaration of Leisnoi's entitlement under ANCSA. However, under section 14(a) of ANCSA, the only village corporations entitled to a conveyance are corporations representing Native villages which the Secretary has found "qualified for land benefits under this chapter." 43 U.S.C. § 1613(a). Where the Secretary's finding with respect to Leisnoi was still subject to a judicial challenge at the time section 1427 was passed, the question arises: Did Congress, in defining Leisnoi as an entitled corporation under section 14(a) of ANCSA, ratify (accept as final) the secretary's finding that Leisnoi was "qualified for land benefits," thus mootng the pending judicial challenge, or did it simply acknowledge that, pending the outcome of the challenge, Leisnoi was "entitled" under section 14(a)

## APPENDIX C - 26

to a conveyance, based on the 1974 determination by the secretary?

While I acknowledge, as did the district court, that these are "difficult question[s]," I conclude for the following reasons that the better reading of section 1427 is as a ratification of the 1974 eligibility determination that mooted Stratman's challenge.

First, to resolve the ambiguity in subsections (b)(1) and (a)(2), I rely on one of the cardinal canons of statutory construction: a statute is to be read as a whole. *Washington State Department of Social and Health Services v. Keffler*, 537 U.S. 371, 384 n.7 (2003). When read as a whole, it is clear that section 1427 was intended to settle with finality and "as soon as practicable" the land entitlements of Koniag Regional Corporation and its villages and, to a lesser extent, the land entitlements of all of the entities entitled to ANCSA benefits. Certainty about the status of Leisnoi was a necessary predicate to achieving that finality. Without such certainty, the full entitlements of all of the parties affected by the settlement would either be incapable of calculation or, if conveyances and other distributions of benefits were made on the assumption that Leisnoi was an eligible village, they would run the risk of having to be amended or corrected at some indeterminate date depending on the outcome of Stratman's challenge. For example,

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Leisnoi's status was key to: 1) the amount of subsurface acreage to which Koniag regional corporation was entitled; 2) the sharing of costs and revenues by the Afognak Island joint venture partners; and 3) the 12(b) land entitlements of not just Koniag and its villages but the land entitlements of all eleven of the regional corporations and their villages.

Reading section 1427 as a whole, and in the absence of any clear evidence to the contrary, I conclude that the language in subsections (b)(1) and (a)(2) is best read as ratifying the Secretary's eligibility determination with respect to Leisnoi.<sup>7</sup>

Second, I believe it is appropriate to apply the well-established canon of statutory construction that "remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); see also *Atchison, T. & S.F.R. v. Buell*, 480 U.S. 557, 561-562 (1987); *Peyton v. Rowe*, 391 U.S. 54, 65 (1968). Section 1427 was designed to remediate the problem of Koniag's

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<sup>7</sup>Stratman argued before the IBLA that "nothing in section 1427 or the legislative history evidences any intent by Congress to exempt [Leisnoi] from the eligibility requirements of section 11(b)(3) of ANCSA." However, the argument is not that Congress exempted Leisnoi from the eligibility requirements, but, rather, that it accepted the Secretary's determination that those requirements had been met.

## APPENDIX C - 28

and its villages' entitlement to deficiency acreage. The deficiency acreage on the Alaska Peninsula, which was roughly 30 miles away across the Shelikof Strait, was inadequate for Koniag's and its villages' purposes. Congress intended section 1427 to provide a permanent solution to Koniag's and its villages' need for land. Section 1427, therefore, should be construed broadly to effectuate Congress's intent to settle Koniag's land entitlement permanently. In order to do so, it is necessary to read section 1427 as settling Leisnoi's status as an ANCSA village. As explained above, to do otherwise would not effectuate section 1427's purpose of permanently settling Koniag's land entitlement.

Finally, because section 1427 is arguably ambiguous, it is appropriate to examine its legislative history for indications of congressional intent. Such an examination reveals that Congress, when considering section 1427, was aware that questions had been raised about the eligibility of Leisnoi. Indeed, when Congress first began consideration of how to resolve the Koniag land claims, the Sierra Club testified:

The Koniag amendment is ... premature because of the uncertainty surrounding the amount of subsurface estate Koniag is entitled to. Its entitlement is based in part on the certification by Interior of [Leisnoi] as

## APPENDIX C - 29

[an] eligible village despite clear Congressional intent to the contrary. [Leisnoi] is a former FAA installation. ... Accordingly, we recommend that the Committee defer consideration of the Koniag amendment pending a Committee investigation of the certification of [Leisnoi] and a final determination of subsurface entitlement.

Amendments to Alaska Native Claims Settlement Act: Hearing Before the Comm. On Interior and Insular Affairs U.S. Senate, 94<sup>th</sup> Cong. at 392 (1975). Attached to Sierra Club's prepared statement was a copy of a letter from the President of the Kodiak--Aleutian Chapter of the Alaska Conservation Society that stated that Interior "should not have certified" Leisnoi, and that requested that the "Interior Committee direct a full and open investigation of the circumstances of the improper certification" of Leisnoi. *Id.* at 397.

Because Congress was specifically aware of concerns about Leisnoi's eligibility, and had been cautioned that settlement of the Koniag issues prior to a resolution of concerns would be premature, it is reasonable to conclude that, in choosing to proceed with the settlement, Congress intended to moot the concerns about Leisnoi's eligibility.

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### C. The IBLA's Reasoning

The IBLA acknowledges that Congress had the power to moot Stratman's challenge to Leisnoi's eligibility. However, for the three reasons discussed below, none of which is based on an analysis of the words of the statute itself, the IBLA concludes that "the listing of Leisnoi in section 1427(a)(4) and its entitlement to lands on Afognak Island was not a ratification of its eligibility," but "was merely reflective" of the fact that "there was extant [at the time section 1427 was passed] a final decision" of the Secretary certifying its eligibility.

The lack of an immediate judicial challenge - The IBLA notes that when section 1427 was passed in 1980, "Stratman's decertification litigation had been dismissed by the district court," and "was on appeal to the circuit court on procedural grounds." *Stratman v. Leisnoi*, 157 IBLA at 314. It then inexplicably concludes that because the appeal was "on procedural grounds," there was no "immediate judicial challenge" to Leisnoi's eligibility when section 1427 was passed, and that Congress could therefore not have intended to moot the challenge. *Id.* However, just because the pending appeal was "on procedural grounds" does not mean there was nothing to moot. The inescapable fact is that when section 1427 was passed there was an outstanding judicial challenge to the eligibility of Leisnoi that had the potential, depending on how it was

## APPENDIX C - 31

ultimately resolved, of negatively affecting the settlement of the Koniag issues that Congress was then considering. Congress could well have intended to moot such a challenge by accepting as final the Secretary's determination that Leisnoi was eligible, so the settlement of the Koniag land claims could proceed.

Seven Unlisted Villages - The IBLA then states that its conclusion about Congress' intent is "reinforced by the fact that in the same section, Congress expressly provided for the resolution of disputes concerning the status of seven unlisted villages by declaring each to be 'deemed an eligible village' under" ANCSA. *Id.* According to the IBLA, Congress "could have done the same for Leisnoi, but it did not," and must therefore not have intended to moot Stratman's challenge. *Id.* The IBLA's reasoning; however, ignores the fact that the situation of Leisnoi was different than that of the seven unlisted villages, and therefore did not require the same treatment. At the time that section 1427 was passed, Leisnoi had been certified as an eligible Native village, while the status of the seven unlisted villages was uncertain – they had initially been determined ineligible, but that determination had been overturned by a court and was back before the Department on remand. To enable the Koniag settlement to go forward in a timely manner, the uncertainty about the status of the seven unlisted villages had to be resolved. Congress therefore

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adopted a compromise in which the villages would be deemed eligible in the statute but would forfeit some of their rights under ANCSA to receive land. No such compromise was necessary in the case of Leisnoi. To enable the Koniag settlement to go forward, Congress needed simply to accept the Secretary's eligibility determination with respect to Leisnoi as final, which is what I have concluded section 1427 does.

Moreover, the IBLA's reasoning leaves unanswered a significant question: Why would Congress take such pains to resolve the status of the seven unlisted villages, so that the Koniag settlement could proceed, and yet leave unresolved the question that had been raised about Leisnoi's eligibility? As discussed above, leaving the status of Leisnoi unresolved ran the risk of seriously disrupting the implementation of the many interconnected provisions in section 1427.

The 1995 Stratman Bill - Finally, the IBLA relied on the fact that, at the time of the 1995 remand, the Senate had passed a bill that specifically "confirmed [Leisnoi] as an eligible Alaska Native Village, pursuant to Section 11(b)(3)" of ANCSA. The IBLA concludes that the provision, which ultimately did not become law, "would not have been needed if, in fact, section 1427 in 1980 had acted as ratification of Woody Island's eligibility." *Stratman v. Leisnoi*, 157 IBLA at 315.

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However, legislation proposed to a Congress sitting in 1995 that does not pass, is not a reliable indicator of what another Congress sitting 15 years earlier in 1980 may or may not have intended.

### IV. Conclusion

For the reasons explained above, I conclude that section 1427 ratified Leisnoi's status as a Native village eligible for ANCSA benefits, thus mooted Stratman's challenge to Leisnoi's status. I therefore recommend that you disapprove the IBLA's decision.

**APPENDIX D**

**Decision of the  
Interior Board of Land Appeals**

**dated October 29, 2002**

## **APPENDIX D - 1**

**OMAR STRATMAN v. LEISNOI, INC.,  
KONIAG, INC., INTERVENOR, BUREAU OF  
INDIAN AFFAIRS, INTERVENOR**

**IBLA 2000-16**

**Interior Board of Land Appeals**

**157 IBLA 302; 202 IBLA LEXIS 46**

**October 29, 2002, Decided**

**ACTION:**

**[\*\*1]**

**[\*302]** Decision following issuance of a recommended decision by Administrative Law Judge Harvey C. Sweitzer on the issue referred to the Board by the United States District Court for the District of Alaska of whether Woody Island is an eligible Native village under section 11(b)(3) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1610(b)(3) (1994).

Case returned to District Court.

**HEADNOTES:**

1. Alaska Native Claims Settlement Act: Native Land Selections: Village Selections: Generally--Alaska Native Claims Settlement Act: Village Eligibility: Generally--Patents to Public

## APPENDIX D - 2

### Land: Effect

While the effect of the issuance of a patent by the United States is to transfer the legal title from the United States and to remove from the jurisdiction of the Department the consideration of all disputed questions concerning the rights to lands, that rule is not without qualification, and in a case involving the Secretary of the Interior's special fiduciary responsibility to Alaska Natives, it has been held that the Department retains the responsibility of making an initial determination as to the validity of a Native allotment claim to patented land as a prerequisite to deciding whether or not [\*\*2] the Government should bear the burden of going forward with a suit to annul the patent and thereby restore adjudicatory jurisdiction over the land in question to the Department. However, when an individual, who does not stand in any special legal relationship with the Department, seeks to overturn an Alaska Native village eligibility determination approved by the Secretary, which has been the [\*303] basis for transfer of lands to the village corporation, and the individual has no conflicting claim to the lands, the rationale for the exception does not exist.

### 2. Alaska Native Claims Settlement Act: Village Eligibility: Generally--Patents to Public Land: Effect--Rules of Practice: Appeals: Standing to Appeal

## APPENDIX D - 3

Suits by the United States to vacate and annul any patent must, in accordance with 43 U.S.C. § 1166 (1994), be brought within six years after the date of issuance of such patents. Where land conveyances to an Alaska Native village corporation were made by patents and interim conveyances more than six years ago and title has been quieted in that corporation, the statutory limitation bars further Departmental involvement at any level, regardless of the possible merits of a challenge [\*\*3] to the village's eligibility by an individual with no special relationship to the Department and no adverse claim to any of the land transferred to the Native village corporation.

APPEARANCES: John R. Fitzgerald, Esq., New Orleans, Louisiana, for Leisnoi, Inc.; Michael J. Schneider, Esq., Anchorage, Alaska, for Omar Stratman; James R. Mothershead, Esq., Assistant Regional Solicitor, Office of the Regional Solicitor, Alaska Region, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Indian Affairs; R. Collin Middleton, Esq., and Brennan P. Cain, Esq., Anchorage, Alaska, for Koniag, Inc.

## APPENDIX D - 4

### OPINION BY: HARRIS

### OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

This case originally came before the Board in 1995. On November 21, 1995, the United States District Court for the District of Alaska entered an order in the case of Stratman v. Babbitt, No. A76-0132 CV (JKS), remanding the case to this Board for consideration of Omar Stratman's challenge to the eligibility of Woody Island (incorporated as Leisnoi, Inc. (Leisnoi)) as a Native village under section 11(b)(3) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1610(b)(3) (1994). **[\*\*4] n1 [\*304]** The Board docketed the case as Omar Stratman (On Judicial Remand), IBLA 96-152. Thereafter, pursuant to 43 CFR 4.29, the parties filed reports recommending procedures to be followed by the Board in order to comply with the court's order.

n1 The court's Nov. 21, 1995, remand order disposed of certain pending motions. The court had initially remanded the case in an order dated Sept. 13, 1995. Technically, however, the case was not a remand, but a referral for agency action. Stratman never sought nor received a final

## APPENDIX D - 5

agency decision on the question of the eligibility of Woody Island for ANCSA benefits. The case "remanded" to this Board originated in Federal Court in 1976.

While this case commenced with the Board in 1995, its history extends to the early 1970's when the unlisted village of Woody Island filed an application with the Bureau of Indian Affairs (BIA) seeking ANCSA benefits. n2 Following an investigation, the Acting Area Director, Juneau Area Office, BIA, provided notice by publication in the Federal Register on December 21, 1973, 38 FR 35028, of his decision that various Native villages, including Woody Island, were eligible [\*\*5] for benefits under ANCSA. He allowed interested parties an opportunity to protest. Timely protests were filed, but Stratman did not protest. The Acting Area Director considered the timely protests and in his final decision published in the Federal Register on February 21, 1974, 39 FR 6627, found Woody Island to be an eligible Native village. The protestants filed administrative appeals, and, in an order dated August 28, 1974, the Alaska Native Claims Appeal Board (AN CAB) dismissed the appeals and directed the Area Director to certify the Native village of Woody Island to be eligible for benefits under ANCSA. n3 The Secretary approved that determination on September 9, 1974, and it became a final Department decision. See 43 CFR 2651.2(a)(5) (1973). Thus, administrative

## APPENDIX D - 6

proceedings concerning the eligibility of the unlisted village of Woody Island for ANCSA benefits concluded in 1974.

n2 Congress set forth at section 11(b)(1) of ANCSA, 43 U.S.C. § 1610(b)(1) (1994), a list of Native villages considered to be presumptively eligible for the benefits afforded by the statute. Woody Island was not listed. However, in section 11(b)(3), Congress provided criteria for the Secretary to follow in determining whether other villages, not listed in subsection (b)(1), were eligible for benefits. 43 U.S.C. § 1610(b)(3) (1994). [\*\*6]

n3 There were three appellants in that case, the Sierra Club, the Alaska Wildlife Federation and Sportsmen's Council, and Phil R. Holdsworth. On May 20, 1974, the latter two appellants filed a "Notice of Inability to Continue in Appeals Proceedings." However, they requested that ANCAB consider the points of law raised in their previous pleadings. By order dated May 24, 1974, ANCAB dismissed them as appellants, but accorded them amicus curiae status. Thereafter, on July 13, 1974, the Sierra Club

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withdrew its challenge to the eligibility of Woody Island. In its Aug. 28, 1974, order, ANGAB stated that it had "considered the briefs previously filed by the Alaska Wildlife Federation and Sportsmen's Council and Phil R. Holdsworth, and finds the legal arguments advanced therein to be without sufficient merit to justify the continuance of these proceedings." (Order at 2.)

However, in 1976 Stratman commenced his judicial challenges to Woody Island's eligibility in what became known as the "decertification [\*305] litigation." n4 At that time, he and several other residents of Kodiak Island filed suit in the United States District Court for the District of Alaska seeking to enjoin [\*\*7] the United States from patenting any land to Leisnoi, the village corporation, under ANCSA. n5 The plaintiffs in that litigation alleged two sources of standing--all claimed that transfer of lands to the Native village corporation would injure their recreation interests in the land and two plaintiffs, Stratman and Toni Burton, also asserted direct economic injury because they held Federal grazing leases on some of the lands selected by Leisnoi.

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n4 A time line covering actions through 1985 is found in the decision of the Supreme Court of Alaska, *Leisnoi, Inc. v. Stratman*, 835 P.2d 1202, 1214-15 (1992), and BIA, in its report to the Board, provided a concise chronological narrative of events from the time of Woody Island's 1973 application for recognition as a qualified Native village to the district court's 1995 remand. BIA Report at 7-14. We will not recount that history in detail herein.

n5 Stratman also pursued an administrative appeal of the BIA's Jan. 19, 1977, decision finding Leisnoi to be entitled to ANCSA benefits. However, ANCAB dismissed Stratman's appeal finding that, although Stratman's Federal grazing lease was a property interest in land under the meaning of 43 CFR 4.902 (1977), he was not adversely affected by the decision and, therefore, lacked standing to appeal. Appeal of Omar Stratman, 2 ANCAB 329 (1978). [\*\*8]

The district court dismissed the claims based on recreational injury because of plaintiffs' failure

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to exhaust administrative remedies following notice in the Federal Register of Woody Island's application. However, it declined to dismiss Stratman's and Burton's claims, based on the rationale that their grazing leases entitled them to actual, rather than constructive, notice of the application and BIA's decision. *Kodiak-Aleutian Chapter of the Alaska Conservation Society v. Kleppe*, 423 F. Supp. 544, 547 (D. Alaska 1976). Thereafter, Leisnoi relinquished any claims to lands covered by the Federal grazing leases and the district court dismissed the case as moot. *Stratman v. Andrus*, A76-132 (Oct. 16, 1978).

Stratman and others sought review by the United States Court of Appeals for the Ninth Circuit. That court remanded the case to the district court for a ruling on the Government's motion for relief from judgment. In that motion, the Government had argued that persons who held grazing leases (such as Stratman and Burton) and other interests which constituted valid existing right under section 14(g) of ANCSA, 43 U.S.C. § 1613(g)(1994), should not be allowed to collaterally attack village eligibility decisions because the property interests which gave rise to their due process claims were protected by that section. Thereafter, United States District Chief Judge von der Heydt, in granting the Government's motion, held:

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The government correctly contends that the plaintiffs could allege no injury to their property interest because the Alaska Native Claims Settlement Act, *43 U.S.C. § 1613(g)*, [**\*306**] protects all valid existing rights and makes the land patented the Natives subject to those rights. The Act provides:

[“]Where prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement (including a lease issued under 6(g) of the Alaska Statehood Act) has been issued. . the patent shall contain provisions making it subject to the lease, contract . .”

*43 U.S.C. § 1613(g)*. This provision means that whatever property interests were held by Stratman and Burton, including the federal grazing leases, could not be injured by Woody Island's eligibility and the selection of land by [**\*\*10**] its village corporation. Any patents issued to the village corporation would have to protect the

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property interests upon which the court previously based its decision on exhaustion of administrative remedies.

*Stratman v. Andrus*, 472 F. Supp. 1172, 1173-74 (D. Alaska 1979). Accordingly, he vacated that portion of his 1976 decision denying the Government's motion to dismiss as to Stratman and Burton, and he dismissed the claims of Stratman and Burton.

Stratman again appealed to the United States Court of Appeals for the Ninth Circuit, and that court held that, as recreational users, all the plaintiffs had standing to appeal. However, it then differentiated between the plaintiffs with purely recreational interests and the plaintiffs who had recreational interests and, through their Federal grazing leases, "record interests in land which was subject to allotment." *Stratman v. Watt*, 656 F.2d 1321, 1325 (9th Cir. 1981). It affirmed the dismissal of the action as to the former group on the basis of their failure to exhaust administrative remedies following notice in the Federal Register of Woody Island's application. [\*\*11] Id. It concluded that those plaintiffs were not entitled to actual notice.

On the other hand, it held that it agreed with the district court's original determination that the latter group was entitled to actual notice of the application, and that "since they did not receive such notice, they should not be barred by exhaustion requirements." Id. The circuit court then

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concluded:

The district court, in finally disposing of this case on jurisdictional grounds, did not consider Stratman's and Burton's remaining recreational interests and therefore did not weigh the various alternatives which might be open to it in this regard. The judicial requirement of exhaustion of administrative remedies is not mechanically applied and we believe the question should [\*307] be considered initially by the district court; we remand for such consideration.

*Id.* at 1326.

The district court did not rule on that remand because the decertification litigation was voluntarily dismissed in 1982 on the basis of a settlement agreement between Stratman and Koniag, later declared invalid. n6 In 1994, the United States Court of Appeals for the Ninth Circuit directed the [\*\*12] United States District Court for the District of Alaska to reopen Stratman's decertification litigation. *Stratman v. Babbitt*, No. 93-36006 (9<sup>th</sup> Cir. Dec. 4, 1994); BIA Report, Appendix O.

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n6 At the time of the settlement, Leisnoi had merged with Koniag and Koniag had taken over Leisnoi's defense in the decertification litigation. In 1984, the merger was declared void ab initio. See *Leisnoi, Inc. v. Stratman*, 835 P.2d at 1204-05.

In a scheduling Order dated May 10, 1995, Judge von der Heydt, who presided in the original suit, "identified five threshold issues in this action." (Leisnoi's Report, Ex. 6 at 1.) He listed those issues, as follows:

1. Whether the court should dismiss this action for failure of plaintiff Omar Stratman (hereinafter "plaintiff") to exhaust his administrative remedies;
2. Whether res judicata bars this action;
3. Whether plaintiff's second settlement agreement with Koniag, Inc., contractually precludes Stratman from proceeding against Leisnoi, Inc.; n7
4. Whether Section 1427 of the Alaska National Interest Lands Conservation Act [(ANILCA), Pub. L. No. 96 - 487, 94 Stat. 2519-20 (1980)] constitutes congressional [\*\*13] ratification of Leisnoi's eligibility thus barring

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plaintiff's action; and

5. Whether plaintiff's lis pendens should be expunged.

Id.

n7 At page 12 of its report, BIA states that Koniag and Stratman entered into a second settlement agreement, dated June 6, 1990, and recounts some of the provisions of that agreement.

The court allowed briefing on the issues and stated: "If the court does not resolve this action on one of the five threshold issues, the court [\*308] will remand the matter to the Interior Board of Land Appeals for a determination of Leisnoi's eligibility." Id. at 2.

The court did not resolve the case on any of those issues. In an Order dated September 13, 1995, Judge James Singleton, to whom the case had been transferred following Judge von der Heydt's retirement, found that res judicata did not bar the action, that failure to exhaust did not apply to the action "since the Ninth Circuit has already determined that Stratman did not have notice of the occasion to exhaust administrative remedies," and that Koniag's second settlement did not preclude Stratman's action. (Order at 2). He further stated:

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This appears to be a perfect case to read ripeness [\*\*14] and primary jurisdiction together to require that Stratman litigate his challenge to Leisnoi before the agency before he brings it here. The agency in the first instance should determine whether Leisnoi is a phantom of the Secretary's imagination, as Stratman contends, or as its members contend, the modern representative of an ancient people, the victim of an itinerant berry picker. Sending the issue back will permit the agency to exercise its expertise. If there is a reasonable basis for the Secretary's action, taking into account the limited time Congress allowed him for making the determination, his action will be upheld. If, despite the leeway he must be given, the Secretary did certify a phantom village, the agency is the best place for that determination to be made. \* \* \*

\* \* \* \*

This case should therefore be sent to the IBLA for consideration of Stratman's challenge to Leisnoi. That course will permit exhaustion of administrative remedies, albeit belated, and give the Court the benefit

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of the agency's expertise and the agency the benefit of any intervening action by Congress. \* \* \* Leisnoi has been in limbo too long. It should have an opportunity to show that it is real.

[\*\*15]

(Order at 2-3.)

Regarding the issue of ratification under section 1427 of ANILCA, Judge Singleton stated: "This is a difficult question that should be decided in the first instance by the agency." Id. at 2. n8

n8 The court made no mention of the fifth issue listed in the May 10, 1995, Order.

In his November 21, 1995, Order, Judge Singleton denied further motions of the parties, including requests by Stratman that the court direct this Board to expedite the matter, and stated:

[\*309] It is unfortunate that a case with a 1976 docket number is still pending. Stratman fears that agency action, like a tree to be grown from a seed, takes much time. The Court agrees. We had best plant the seed so that the tree can begin to grow. An interlocutory appeal would not speed the termination of this litigation. The parties have already been to the circuit

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and back. The agency should address the statutes and regulations in the first instance. n9

n9 In an oral argument on Apr. 8, 1996, before the United States Court of Appeals for the Ninth Circuit in *Stratman v. Babbitt*, No. 95-35376, an interlocutory appeal proceeding from denial of a preliminary injunction, Stratman argued that despite its remand Order, the district court had "retained jurisdiction of a number of issues in this case." (Reply to Stratman's Opposition to Motion to Strike, Ex. 3 at 3.) The court disagreed: "After this appeal was filed, the district court, on November 21, 1995, entered judgment and remanded this action, in its entirety, to the Interior Board of Land Appeals." (Emphasis in original.) Id., Ex. 4; see id., Ex. 3 at 18. The court dismissed Stratman's appeal as moot and, on June 3, 1996, denied Stratman's petition for rehearing. Id., Ex. 5. Also, on June 14, 1996, the court dismissed Stratman's appeal of the district court's remand Order. Id., Ex. 9. [\*\*16]

In their reports to this Board about the proper procedure to take following the court's

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"remand," the parties took various positions about whether the Board should decide any controlling legal issues first or address the factual issue of eligibility. After considering each of those reports, the Board concluded that the proper course of action in complying with the court's referral order was to defer ruling on any possible controlling legal issues and refer the case to the Hearings Division for the assignment of an Administrative Law Judge to provide a recommended decision on the eligibility issue. Our rationale was that any ruling by the Board on a controlling legal issue at that juncture would have resulted in immediate further judicial review, the culmination of which could have been another remand for an eligibility determination.

We now have before us the results of our referral to the Hearings Division, Judge Sweitzer's recommended decision on the eligibility of Woody Island, and the legal issues raised by the parties. n10 The Board finds itself in a novel position in this case because our jurisdiction has not been invoked in the usual fashion. This Board is a quasi-judicial [\*\*17] tribunal whose only function and obligation is to consider and decide appeals over which it has jurisdiction. 43 CFR 4.1(b)(3). Ordinarily, a party adversely affected by a decision of an agency official would seek review by this Board of such a decision. In this case, however, there is no agency [\*310] decision for direct review. All the agency decisions in this case issued over 25

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years ago. The case has found its way to us on referral from District Judge Singleton, who read "ripeness and primary jurisdiction together to require that Stratman litigate his challenge to Leisnoi before the agency before he brings it here." (Sept. 13, 1995, Order at 2.)

n10 Stratman argues that the Board lacks jurisdiction to determine any issues other than those referred by the district court, which he asserts are whether Leisnoi satisfied ANCSA's criteria for eligibility as a native village; and (2) whether Leisnoi's status as an eligible native village was ratified by Congress in its passage of section 1427 of ANILCA. We disagree. We do not read the court's referral to be so limiting.

### Jurisdiction/Administrative Finality

Stratman seeks to resurrect the issue of the eligibility of Woody Island [\*\*18] for ANCSA benefits, an issue decided with administrative finality in 1974 when the Secretary of the Interior approved the determination that Woody Island was, in fact, eligible. Since that time the Department of the Interior has treated Woody Island as an Alaska Native village and the benefits of that eligibility have been bestowed on Leisnoi.

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In a decision dated September 24, 2001, the United States Court of Appeals for the Ninth Circuit ruled in a Quiet Title Act action brought by Leisnoi, and dismissed by the District Court for the District of Alaska for lack of jurisdiction, that the district court erred in dismissing the case. *Leisnoi, Inc. v. United States*, 267 F.3rd 1019 (9th Cir. 2001). The land at issue was the surface estate of lands described in Patent Nos. 50-86-0067, 50-86-0093, 50-86-0632, 50-86-0634, and interim conveyances 171 and 1137 issued by the United States to Leisnoi. The circuit court held that two conditions must exist before a district court can exercise jurisdiction over an action under the Quiet Title Act, 28 U.S.C. § 2409a (1994): (1) the United States must claim an interest in the property [\*\*19] at issue; and (2) there must be a disputed title to real property between interests of the plaintiff and the United States. It found that the first condition existed because the United States claimed reserved easements in Leisnoi's property. It explained that the condition was met, even though Leisnoi did not dispute the Federal Government's entitlement to those easements, because the relevant language of the Quiet Title Act does not require that the claimed interest be in dispute. It found the second requirement met because, at the time the complaint was filed (and since), there was a continuing dispute between the asserted interests of Leisnoi and the United States in the property at issue. It stated that

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the fact that the United States' interests in the dispute were asserted by Stratman, rather than the United States itself, did not change the conclusion. The court ruled that a third party's claim of an interest of the United States can suffice to create a dispute in title if the third party's claim clouds the plaintiff's title. *Leisnoi, Inc. v. United States, supra at 1023*. The court expressly stated, however, that "the land could not revert to the [\*\*20] United States regardless of the outcome of the decertification proceeding [pursued by Stratman]."*Id. at 1022 n.2.*

On remand, the district court noted the circuit court's language that, regardless of the outcome of the decertification proceeding, the land [\*311] could not revert to the United States. It also stated that on January 9, 2002, the United States had disclaimed any interest in the lands included in the patents and interim conveyances, "except for those property interests retained or reserved on the face of those patents and/or interim conveyances or statutorily reserved." The district court confirmed the disclaimer of interest filed by the United States and quieted title to the surface of the lands in Leisnoi. *Leisnoi Inc. v. United States, No. A99-608 CV (HRH) (Jan. 15, 2002).*

[1] The effect of the issuance of a patent by the United States is to transfer the legal title from the United States and to remove from the jurisdiction of the Department the consideration of

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all disputed questions concerning the rights to lands. *Germania Iron Co. v. United States*, 165 U.S. 379, 383 (1897); *Southern Pacific R. Co. v. United States*, 51 F.2d 873 (9<sup>th</sup> Cir. 1931); *Sage v. United States*, 140 F. 65 (8<sup>th</sup> Cir. 1905); *Eddie S. Beroldo*, 123 **IBLA** 156, 158 (1992); *Lone Star Steel Co.*, 101 **IBLA** 369, 374 (1988). n11 However, that rule is not without qualification. Thus, the court recognized in *Aguilar v. United States*, 474 F. Supp. 840 (D. Alaska 1979), that, where the land sought by a Native allotment applicant had been previously conveyed out of Federal ownership and, therefore, was no longer subject to the Department's adjudicatory jurisdiction, the Department nevertheless retained the responsibility of making an initial determination as to the validity of the allotment claim as a prerequisite to deciding whether or not the Government should bear the burden of going forward with a suit to annul the patent and thereby restore adjudicatory jurisdiction over the land in question to the Department.

n11 An interim conveyance operates like a patent under 43 U.S.C. § 1621(j) (1994), and title to the affected land passes from the United States. *Bay View, Inc.*, 126 **IBLA** 281, 286 (1993); *Heirs of Linda Anelon*, 101 **IBLA** 333, 336 (1988); *Peter Andrews, Sr.*, 77 **IBLA** 316, 319 (1983). [\*\*22]

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The basis for the exception in Aguilar was the court's recognition of the Secretary's special fiduciary responsibility to Native Americans, in that case, Alaska Natives. The court stated: "The protection of Indian property rights is an area where the trust responsibility has its greatest force." *Aguilar v. United States*, 474 F. Supp. at 846 (citations omitted).

The rationale for creation of the exception in Aguilar does not exist in this case, however. The individual seeking to overturn the Department's eligibility determination does not stand in any special legal relationship to the Federal Government. In addition, he does not have a conflicting claim to the lands transferred to Leisnoi. In fact, he never made an administrative challenge to Woody Island's eligibility.

[2] Moreover, suits by the United States to vacate and annul any patent must, in accordance with 43 U.S.C. § 1166 (1994), be brought within six years after the date of issuance of such patents. See *United States v. Eaton Shale Co.*, 433 F. Supp. 1256 (D. Colo. 1977). The patents and interim conveyances to Leisnoi [\*\*23] were all made more than six years ago and [\*312] title to those lands has been quieted in Leisnoi. Such facts brings into play the limitation against the United States provided by that statute and bar further Departmental involvement at any level, regardless of the possible merits of Stratman's challenge. See

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*State of Alaska*, 45 IBLA 318, 330 (1980). Therefore, even assuming that Stratman had a meritorious claim, we could not recommend to the Secretary that she support litigation by the United States to recover title from Leisnoi because the statute protects Leisnoi's title from such action. n12

n12 In *Cramer v. United States*, 261 U.S. 219, 233 (1923), the Court held that, despite the fact that more than 6 years had passed since issuance of patent, the United States had jurisdiction "to remove a cloud upon the possessory rights of its [Indian] wards." Because of that relationship, the Court found that the action on behalf of Indian allotment claimants could be maintained despite the 6-year statute of limitations "because the relation of the Government to them is such as to justify or require its affirmative intervention." *Id.* at 234. No such relationship exists in this case.  
[\*\*24]

Because this Board lacks subject matter jurisdiction in this case, we have no authority to entertain Stratman's challenge to Woody Island's eligibility, which has made its way to us through referral from a court. The court cannot vest the Board with jurisdiction it does not have. Were Stratman's challenge to have arrived, as our cases

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do, in the form of an appeal from an agency decision, it would be dismissed.

Nevertheless, we recognize that an agency, on remand of a matter from a court, must obey the court's mandate and directions without variation and, if the cause is remanded with specific directions, further proceedings before the agency must be in substantial compliance with such directions, even if the directions are erroneous. *Mefford v. Gardner*, 383 F.2d 748, 758-59 (6th Cir. 1967).

While this case has not been remanded to us, it has been referred to us. And the district court has asked that we bring agency expertise to bear on questions before it. Despite our lack of subject matter jurisdiction, we have followed the court's directive by referring the eligibility question to the Hearings Division, Office of Hearings and Appeals, for a recommended **[\*\*25]** decision. Judge Sweitzer's decision, which concluded that Woody Island was not an eligible village under sections 14(a) and (b) of ANCSA, fulfills the court's mandate on that issue. Next, in compliance with the court's order we will address the requisite legal issues.

### Ratification

The legal issue referred to the Board by the court is whether Woody Island's status as a Native village has been ratified by Congress.

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In ANILCA, Pub. L. No. 96-487, 94 Stat. 2371, 2518-28 (1980), Congress enacted section 1427, entitled "Koniag Village and Regional Corporation Lands." In section 1427(a)(4) of ANILCA, Congress defined the term "Koniag deficiency village corporation," as meaning any or all of four corporations, one of which was "Leisnoi, Incorporated." It also defined the term "Deficiency village acreage on the Alaska Peninsula" as the aggregate number of acres of public land to which "Koniag deficiency Village Corporations" are entitled, under section 14(a) of the Alaska Native Claims Settlement Act, to a conveyance of the surface estate on account of deficiencies in available lands on Kodiak Island, and to which Koniag, Incorporated is entitled under section 14(f) of that Act to conveyance of the subsurface estate.

### Section 1427(a)(2) of ANILCA.

Congress then provided that in satisfaction of various rights, including "the right of each Koniag Deficiency Village Corporation to conveyance under [ANCSA] of the surface estate of deficiency village acreage on the Alaska Peninsula," the Secretary of the Interior would convey, as provided in section 1427(c), "the surface estate of all public lands on Afognak Island," with certain exceptions. n13

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n13 Subsection (c) provided that the land on Afognak Island would be conveyed to a joint venture consisting of several parties, including "the Koniag Deficiency Village Corporations."

Leisnoi and Koniag argue that such action by Congress amounts to a ratification of Woody Island's certification and the right of Leisnoi to receive conveyances of land under ANCSA. Such action, itself, they assert, dictates that Stratman's administrative challenge to Leisnoi's eligibility must be dismissed.

Stratman, on the other hand, states that the purpose of section 1427 of ANILCA was merely to exchange the land selection and entitlement rights of various village corporations and Koniag Regional Corporation to the lands on [\*\*27] the Alaska Peninsula, to which they were entitled under ANCSA, for lands on Afognak Island, which were unavailable under ANCSA. Stratman argues that nothing in section 1427 or the legislative history of that provision evidences any intent by Congress to exempt Woody Island from the eligibility requirements of section 11(b)(3) of ANCSA. Section 1427, he claims, only amended the land selection and entitlement provisions of ANCSA by substituting the lands on Afognak Island for those

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lands withdrawn and available for selection by the Koniag villages. Rather than a ratification, Stratman asserts, inclusion of Leisnoi in section 1427 constituted simply an identification or recognition of Woody Island's status as a Native village.

Koniag bases its position on the plenary power of Congress to designate Leisnoi as a Native village. According to Koniag, three sources of Congressional power support its assertion: 1) the power to ratify [\*314] unauthorized acts; 2) the power to dispose of the public land; and 3) the power to moot a pending controversy by enacting new legislation. While Stratman does not dispute that Congress has all those powers, for which Koniag has supplied ample legal authority, [\*\*28] he claims that Congress did not exercise any of them in enacting section 1427, insofar as it affects Leisnoi. First, Stratman asserts that there was no unauthorized act involved in this case because the Secretary of the Interior had the authority under section 11(b)(3) to certify Woody Island as a Native village. Stratman challenges the Secretary's actions as an erroneous exercise of delegated authority, not the exercise of undelegated authority. Second, Stratman agrees that Congress has the power to dispose of public land, and that ANCSA was an exercise of that power, but, he contends, such an assertion begs the question whether Congress repealed the village eligibility requirements of ANCSA by designating Leisnoi as a participant in

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the Afognak exchange. Third, while Stratman does not contest the power to moot a pending lawsuit through legislation, he asserts that Congress did not do so in recognizing Leisnoi in section 1427.

We find that the listing of Leisnoi in section 1427(a)(4) and its entitlement to lands on Afognak Island was not a ratification of its eligibility as a Native village. At the time Congress passed ANILCA there was extant a final decision by the Secretary of [\*\*29] the Interior that Woody Island, in fact, satisfied the ANCSA requirements for status as a Native village. The listing of Leisnoi in section 1427(a)(4) was merely reflective of that status. There was no unauthorized act to ratify and, as an ANCSA Native village, Woody Island was qualified to participate in ANCSA entitlements.

In addition, in 1980, when section 1427 was enacted, Stratman's decertification litigation had been dismissed by the district court (*Stratman v. Andrus*, 472 F. Supp. 1172 (D. Alaska 1979)), although that matter was on appeal to the circuit court on procedural grounds. Thus, in 1980, the Secretary's September 1974 approval of BIA's February 1974 final eligibility determination was in effect, and not the subject of an immediate judicial challenge. In September 1981, after enactment of section 1427, the circuit court reinstated the decertification litigation, remanding the matter to the district court. See *Stratman v. Watt, supra*.

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We must presume that Congress took these facts into account when listing Leisnoi as entitled to the benefits of section 1427 of ANILCA, by virtue of Leisnoi's then unchallenged **[\*\*30]** entitlement under section 14(a) of ANCSA. See 2B Sutherland Statutory Construction § 49.01 (5th Ed. 1992), at 1. The conclusion that it was not the intention of Congress to moot any lawsuit regarding Leisnoi's eligibility by listing it in section 1427(a)(4) is reinforced by the fact that in the same section Congress expressly provided for the resolution of disputes concerning the status of seven unlisted villages by declaring each to be "deemed an eligible village under the Alaska Native Claims Settlement Act." Section 1427(e)(1), Pub. L. No. 96 - 487, 94 Stat. 2525 (1980) (S. Rep. No. 413, 96th Cong., 1<sup>st</sup> Sess. 261, 324 (1979), reprinted in 1980 U.S. Code Cong. & Ad. News 5205, 5268). It could have done the same for Leisnoi, but it did not.

**[\*315]** Other facts support a conclusion that passage of section 1427 was not a ratification of the eligibility of Woody Island's status as an ANCSA Native village. In issuing its September 22, 1995, order, the district court noted at page 1 that "new light" might be shed on the case with enactment of the "Stratman Bill." Id. at 1. The court was alluding to the fact that, at that time, Congress had passed section 109 of H.R. 402, **[\*\*31]** 104th Cong., 1<sup>st</sup> Sess. (1995), which specifically "confirmed [Leisnoi] as an eligible Alaska Native Village, pursuant to

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Section 11(b)(3) of [ANCSA]." See 141 Cong. Rec. S11342, S11343, S11347 (daily ed. Aug. 3, 1995); 141 Cong. Rec. H9068, H9069, H9074 (daily ed. Sept. 18, 1995); 141 Cong. Rec. H9150 - 51 (daily ed. Sept. 19, 1995). However, Congress later resolved to strike section 109 from H.R. 402. See 141 Cong. Rec. H9710 - 11 (daily ed. Sept. 29, 1995); 141 Cong. Rec. S15199 (daily ed. Oct. 17, 1995). In agreeing to the resolution, Congressman Miller, who had worked on the overall legislation, stated:

[Section 109] was added by the other body without public hearings and was intended to intervene in pending litigation. But the Senate did not do their homework. This provision generated significant controversy, especially amongst the affected citizens of Kodiak, AK. Moreover, this technical amendments bill was an inappropriate vehicle for controversy. The gentleman from Alaska and I had worked over two Congresses to develop a consensus on this legislation only to be undercut, in my view, by the other body.

141 Cong. Rec. H9710 (daily ed. Sept. 29, 1995). Legislative **[\*\*32]** confirmation did not occur, and it would not have been needed if, in fact, passage of section 1427 in 1980 had acted as ratification of Woody Island's eligibility.

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### Federally-recognized Tribal Entity

In its objections to Judge Sweitzer's recommended decision, BIA raises a legal issue not discussed in the post-hearing briefs. BIA argues that in 1993 the Department of the Interior confirmed the pre-existing status of "Leisnoi Village (aka Woody Island)" as a federally-recognized tribe by including such village in the published list of "Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs" (Tribal Entities List). *58 FR 54364, 54369* (Oct. 21, 1993). According to BIA, this action by Congress essentially confirmed the status of Woody Island as "a historical (and traditional) sovereign tribe having an identifiable location on Woody Island." (BIA Objections to Recommended Decision at 5.) BIA asserts that "[s]uch status as a recognized tribe cannot be terminated (or decertified) except by Act of Congress." Id.

The preamble to the Tribal Entities List indicates that the Department intended the list to clarify which Native entities in Alaska were operating as Federally-recognized Tribes and also to clarify [\*\*33] that tribes in Alaska enjoyed the same status as tribes in the contiguous 48 states:

[\*316] The purpose of the current publication is to publish an Alaska list of entities conforming to the intent of 25 C.F.R. 83.6(b) and to eliminate any

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doubt as to the Department's intention by expressly and unequivocally acknowledging that the Department has determined that the villages and regional tribes listed below are distinctly Native communities and have the same status as tribes in the contiguous 48 states. \* \* \* This list is published to clarify that the villages and regional tribes listed below are not simply eligible for services, or recognized as tribes for certain narrow purposes. Rather, they have the governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States; are entitled to the same protection, immunities, privileges as other acknowledged tribes; have the right, subject to general principles of Federal Indian law, to exercise the same inherent and delegated authorities [\*\*34] available to other tribes; and are subject to the same limitations imposed by law on other tribes.

*58 FR 54366-67 (Oct. 21, 1993).*

Thereafter, Congress passed the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C.

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§ § 479a and note, 479a-1 (1994), which recognized the Tribal Entities List, confirmed the responsibility and authority of the Secretary to recognize tribes, took notice of the sovereign status of such tribes, and affirmed the obligation of the United States, as part of its trust responsibility, to maintain a government-to-government relationship with those tribes. The act also provided that "a tribe which has been recognized \*\*\* may not be terminated except by Act of Congress." 25 U.S.C. § 479a note (1994). n14 In discussing the Act, the Alaska Supreme Court stated:

And for those who may have doubted the power of the Department of the Interior to recognize sovereign political bodies, a 1994 act of Congress appears to lay such doubts to rest. In the Federally Recognized Tribe List Act of 1994, Congress specifically directed the Department to publish annually [\*\*35] a list of all Indian tribes which the Secretary recognizes to be eligible \*\*\*.

[\*317] Through the 1993 tribal list and the 1994 Tribe List Act, the federal government has recognized the historical tribal status of Alaska Native villages \*\*\*.

*John v. Baker*, 982 P.2d 738 (Alaska 1999).

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n14 In discussing that provision, the Committee stated:

"While the Department clearly has a role in extending recognition to previously unrecognized tribes, it does not have the authority to "derecognize" a tribe \* \* \*. The Committee cannot stress enough its conclusion that the Department may not terminate the federally-recognized status of an Indian tribe absent an Act of Congress."

H.R. No. 781, 103rd Cong., 2<sup>nd</sup> Sess. 1994, 1994 U.S. Code Cong. & Ad. News 3768.

BIA argues that the inclusion of "Leisnoi Village (aka Woody Island)" on the Tribal Entities List "confirmed the status of the Village as a historical (and traditional) sovereign tribe having an identifiable location on Woody Island." (BIA Objections to Recommended Decision at 5.) It added that, as an historical tribe, the village can truly be said to be a "traditional village" within the meaning [\*\*36] of 43 CFR 2651.2(b)(2), which provides that no traditional village shall be disqualified for certification "by reason of having been temporarily

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unoccupied in 1970 because of an act of God or governmental authority occurring within the preceding 10 years." Id.

Leisnoi's position is that the Tribal Entity List and the passage of the Federally Recognized Indian Tribe List Act are but the latest factors which "have eliminated the ability of the Department of the Interior and the courts to declare Woody Island not to be an Alaska Native village." (Leisnoi Objections to Recommended Decision at 12.)

The Department of the Interior first published a list of Indian Tribal Entities on February 6, 1979, noting therein that a list of "eligible Alaskan entities" would be published at a later date. *44 FR 7325* (Feb. 9, 1979). Thereafter, it published a "preliminary list" of "Alaskan Native Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs." *47 FR 53133* (Nov. 24, 1982). In 1988, the Department, in publishing an updated list, stated:

The purpose of this updated list is: (1) To comply with [\*\*37] the regulatory requirement of annual publication pursuant to 25 CFR Part 83, (2) to reflect the Alaska entities which are statutorily eligible for funding and services from the Bureau of Indian Affairs, (3) to make it easier for

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previously unlisted, but statutorily eligible, entities to receive funding and services, and in so doing, (4) to describe the criteria used for inclusion on the list and for making additions.

53 FR 52832 (Dec. 29, 1988). The Department stated that the

list includes all of the Alaska entities meeting any of the following criteria which are used in one or more Federal statutes for the benefit of Alaska Natives:

1. Tribes as defined or established under the Indian Reorganization Act as supplemented by the Alaska Native Act.
- [\*318] 2. Alaska Native Villages defined in or established pursuant to the Alaska Native Claims Settlement Act (ANCSA).
3. Village Corporations defined in or established pursuant to ANCSA. \*\*\*

*Id.* at 52833. The list included "Leisnoi, Inc. (Woody Island)." *Id.* at 52834.

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In 1993, the Department published a new list of Alaskan [\*\*38] Native entities stating that the 1988 publication had raised a number of questions regarding the Department's intent and the effect of the list. *58 FR 54365* (Oct. 21, 1993). The Department stated:

The purpose of the current publication is to publish an Alaska list of entities conforming to the intent of 25 CFR 83.6(b) and to eliminate any doubt as to the Department's intention by expressly and unequivocally acknowledging that the Department has determined that the villages and regional tribes listed below are distinctly Native communities and have the same status as tribes in the contiguous 48 states.

*Id.* It also clarified that the 1993 list was limited to entities found to be tribes and did not include non-tribal Alaska Native entities, such as ANCSA village and regional corporations. *Id.* Leisnoi claims that the village continues to be recognized as a tribe, citing *63 FR 71945* (Dec. 30, 1998).

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The question presented is whether Congressional recognition of the Department's listing of Woody Island on the Tribal Entities List constitutes ratification of the status of Woody Island as an Alaska Native village, such that [\*\*39] the Department is barred from engaging in further proceedings investigating the eligibility of that village to receive ANCSA benefits.

In the Federally Recognized Indian Tribe List Act of 1994, Congress found that tribes could be recognized in any of three ways: (1) by act of Congress, (2) by the administrative procedures in 25 CFR Part 83, or (3) by a decision of a United States court. *25 U.S.C. § 479a note* (1994). As stated above, the 1993 preamble to the publication of the Tribal Entities List states that the tribes on that list "conform[ed] to the intent of 25 CFR 83.6(b)." Thus, to the extent tribes on the list had not been recognized by an act of Congress or by a decision of a United States court, their inclusion on the list indicated that they had been recognized by the administrative procedures in 25 CFR Part 83. The appearance of "Leisnoi Village (aka Woody Island)" on the list indicates that it "conform[ed] to the intent of 25 CFR 83.6(b)." Congress also found, as set out above, that "a tribe which has been recognized in one of these manners may not be terminated except by Act of Congress." *25 U.S.C. § 479a* [\*\*40] note (1994).

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[\*319] Stratman asserts that inclusion of Woody Island on the Tribal Entities List does not establish that Woody Island constitutes an eligible ANCSA Native village, but only that it constitutes a “tribe.” Stratman is correct. While a tribe may be a Native village and vice versa (*43 U.S.C. § 1602(d)* (1994)), in order to constitute an ANCSA Native village a tribe must satisfy the ANCSA criteria for eligibility. There is no evidence that Congress either expressly or impliedly modified the village eligibility requirements of ANCSA in enacting the Federally Recognized Indian Tribe List Act of 1994. The fact that Woody Island appears on the Tribal Entity List means that it has been recognized as a tribe. That recognition is related to its status as an ANCSA Native village, but whether or not it is entitled to that status is a separate question, one that was decided with administrative finality by the Secretary in September 1974. Moreover, as with the arguments concerning the effect of section 1427 of ANILCA, if Woody Island’s status as an ANCSA Native village had been confirmed by the Federally Recognized Tribe List Act of 1994, there [\*\*41] would not have been any need for the “Stratman Bill” in 1995, discussed *supra*.

Issues such as standing and timeliness raised by Leisnoi are not relevant given the posture of this case and our lack of subject matter jurisdiction. n15 To the extent the parties have raised other legal issues, they have been considered and rejected.

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n15 We note that at the hearing, counsel for Stratman, in cross-examination of Fred Frank Zharoff, a Leisnoi shareholder and Alaska State Legislator, regarding Stratman's Exhibit 30-G, a full page notice in the Apr. 4, 1973, Kodiak Daily Mirror, prepared by Karl Armstrong, a Leisnoi shareholder, showing a comparison of benefits under ANCSA and the land and monetary benefits of enrollment to Woody Island, stated: "The point I'm trying to get you to concede, Senator, is it would be hard for people in a community to not be aware in a community this size with a publication that prominent at that point in time." (Tr. 3110.) Thus, Stratman's point was that virtually everyone on Kodiak Island would have been aware of efforts to enroll Natives to Woody Island. It is certainly conceivable, then, that Stratman himself, as a member of that community, had actual knowledge of such efforts and the subsequent filing of the application and eligibility

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decision and failed to bring any timely administrative challenge thereof.  
[\*\*42]

### Recommended Decision

Judge Sweitzer's 100-page recommended decision in this case represents a comprehensive and exhaustive analysis of the evidence presented in the case consisting of over 3,600 pages of transcript of the testimony of over 40 witnesses; depositions, affidavits, and interviews from over 50 witnesses; over 600 exhibits, totaling thousands of pages, and over a thousand pages of post-hearing briefing. In conclusion, he found that Woody Island did not have 25 or more Native residents on April 1, 1970; was not an established Native village and did not have an identifiable physical location evidenced by occupancy consistent with the [\*320] Natives' own cultural patterns and life-style; and was used during 1970 by less than 13 enrollees to Woody Island as a place where they actually lived for a period of time. (Decision at 99-100.) He also determined that Woody Island was not unoccupied in 1970 due to one or more acts of God or governmental authority occurring within the preceding ten years. (Decision at 86-92.) We have reviewed the objections to Judge Sweitzer's recommended decision filed by the parties and we find no reason to alter his findings and conclusions with [\*\*43] which we agree.

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The court will now have the benefit of our analysis of the legal issues presented by the parties and Judge Sweitzer's recommended decision on the eligibility of Woody Island.

All motions or requests not expressly addressed have been considered and are, hereby, denied.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, we conclude that we do not have subject matter jurisdiction in this matter and we return the case to the District Court. n16

n16 The regulations at 43 CFR 2651.2(a)(5) provide that "[d]ecisions of the Board [of Land Appeals] on village eligibility appeals are not final until personally approved by the Secretary." We do not believe it is necessary to seek Secretarial approval for this decision because we are not issuing a decision on a village eligibility appeal. The Secretary approved the Department's final decision on the eligibility of Woody Island in September 1974.

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**Bruce R. Harris**

**Deputy Chief Administrative Judge**

**CONCUR BY: BURSKI**

**I concur:**

**James L. Burski  
Administrative Judge**

**APPENDIX E**

**ALJ's Recommended Decision,  
U.S. Department of the Interior  
Office Hearings and Appeals**

**dated October 13, 1999**

## APPENDIX E-1

U.S. DEPARTMENT OF THE INTERIOR  
MARCH 3, 1849  
IN REPLY REFER TO:

### **United States Department of the Interior**

OFFICE OF HEARINGS AND APPEALS  
139 East South Temple, Suite 600  
Salt Lake City, Utah 84111  
Phone: 801-524-5344

October 13, 1999

OMAR STRATMAN, : IBLA 96-152  
Protestant : No. A76-0132 CV  
: (JKS)

v. :

LEISNOI, INC., :  
Respondent :  
-----

KONIAG, INC., and :  
BUREAU OF INDIAN :  
AFFAIRS, :  
Intervenors :  
-----

Challenge to the eligibility of Woody Island as a  
Native village under Section 11(b)(3) of the  
Alaska Native Claims Settlement Act, 43 U.S.C.  
§ 1610(b)(3) (1994)

## APPENDIX E-2

### **RECOMMENDED DECISION**

#### Appearances:

Michael J. Schneider, Esq., Anchorage, Alaska for  
Omar Stratman

John R. Fitzgerald, Esq., New Orleans, Louisiana,  
and Robert L. Breckberg, Esq., Anchorage, Alaska  
for Leisnoi, Inc.

R. Collin Middleton, Esq., Anchorage, Alaska for  
Koniag, Inc.

James R. Mothershead, Esq., Anchorage, Alaska  
for the Bureau of Indian Affairs

Before: Administrative Law Judge Sweitzer

## APPENDIX E-3

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## APPENDIX E-6

### I.

#### Statement of the case

On November 21, 1995, the United States District Court for the District of Alaska (District Court) entered an Order in the case of Stratman v. Babbitt, No. A76-0132 CV (JKS), remanding (referring) the case to the Interior Board of Land Appeals (IBLA or Board) for consideration of Omar Stratman's protest against the eligibility of Woody Island as a Native village under section 11(b)(3) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1610(b)(3) (1994). By Order dated November 21, 1997, the Board referred the case to this office with directions to "convene a hearing for the purpose of determining whether Woody Island meets the legal requirements for eligibility for certification as a Native village \* \* \* [and to] issue a recommended decision." Omar Stratman (On Judicial Remand), IBLA 96-152, Purchase Price. 10-11.

The parties, in addition to Protestant, are (1) the Bureau of Indian Affairs (BIA), U.S. Department of the Interior, which issued an Administrative Determination finding Woody Island to be eligible as a Native village under ANCSA, (2) Leisnoi, Inc., which is the Village Corporation for the Native village of Woody Island, and (3) Koniag, Inc., which is the affected Native

## APPENDIX E-7

regional corporation. All parties and I participated in a visit to Woody Island on August 9, 1998. That visit was recorded on video and audio tape.

Commencing August 3, 1998, a hearing lasting ten days was held in the matter, in Anchorage and Kodiak, Alaska. The parties have submitted extensive posthearing briefs, the final filed March 30, 1999, and the matter is now ripe for issuance of this Recommended Decision.

### II.

#### **Procedural history and background**

ANCSA, enacted on December 18, 1971, provides for the distribution of benefits, including approximately forty-four million acres of federal land and \$962,500,000, to Alaska Natives as a settlement of all aboriginal land claims. See 43 U.S.C. §§ 1601(a), 1605, 1607, 1613; Leisnoi, Inc. v. Stratman, 154 F.3d 1062, 1064 (9<sup>th</sup> Cir. 1998). Section 11(b)(1) of ANCSA lists a number of Native villages which were presumed to be eligible for benefits (hereinafter "listed villages"), subject to a review by the Secretary of the Interior for compliance with the criteria set out in subsection (b)(2). 43 U.S.C. § 1610(b)(1) and (2).

Those Native villages which were not listed (hereinafter "unlisted villages") but which believed

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they met the criteria for eligibility could apply to the Secretary to be certified pursuant to subsection (b)(3). 43 U.S.C. § 1610(b)(3). The Native village of Woody Island (hereinafter the "alleged Village") was not one of the listed villages, but applied for certification in 1973 (Ex. BIA-1A, p. 67). Notice of the application was published in the Federal Register. 38 Fed. Regulation. 26472 (Sept. 21, 1973).

The statutory criteria for eligibility of unlisted villages are found at section 11(b)(3) of ANCSA, 43 U.S.C. § 1610(b)(3), which provides in pertinent part:

(3) Native villages not listed in subsection (b)(1) hereof shall be eligible for land and benefits under this chapter \* \* \* if the Secretary \* \* \* determines that-

(A) twenty-five or more Natives were residents of an established village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; and

(B) the village is not of a modern and urban character, and a majority of the residents are Natives.

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Section 3(c) of ANCSA, 43 U.S.C. § 1602(c), defines "Native village" as follows:

(c) "Native village" means any tribe, band, clan, group, village, community, or association in Alaska \* \* \* which meets the requirements of this chapter, and which the Secretary determines was, on the 1970 census enumeration date (as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance), composed of twenty-five or more Natives[.]

The implementing regulation at 43 C.F.R. § 2651.2(b) provides in pertinent part:

(b) \* \* \* [V]illages must meet each of the following criteria to be eligible for benefits \* \* \*:

(1) There must be 25 or more Native residents of the village on April 1, 1970, as shown by the census or other evidence satisfactory to the Secretary. A Native properly enrolled to the village shall be deemed a resident of the village.

## APPENDIX E-10

(2) The village shall have had on April 1, 1970, an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and life style and at least 13 persons who enrolled thereto must have used the village during 1970 as a place where they actually lived for a period of time: *Provided*, That no village which is known as a traditional village shall be disqualified if it meets the other criteria specified in this subsection by reason of having been temporarily unoccupied in 1970 because of an act of God or government authority occurring within the preceding 10 years.

(3) The village must not be modern and urban in character. \* \* \*

(4) In the case of unlisted villages, a majority of the residents must be Native \* \* \*.

As noted by the Board in its Order of referral, an unlisted village applicant must meet each of the four criteria delineated at 43 C.F.R. § 2651.2(b) to be eligible for ANCSA benefits. Omar Stratman (On Judicial Remand), IBLA 96-152, p. 7 n.9. The

## APPENDIX E-11

Board's notation assumes that the applicant constituted, as of April 1, 1970, a "tribe, band, group, village, community, or association" within the meaning of the Section 3(c) definition of "Native village".

Gail Fitzpatrick, a BIA realty specialist, conducted an investigation to determine whether the alleged Village satisfied the eligibility criteria (Ex. BIA-2B, p. 162). He prepared a report dated August 6, 1973, recommending that the alleged Village be certified as an eligible Native village because he concluded that it met the four criteria (*id.*). The BIA Juneau Area Acting Director (Area Director) agreed and issued a proposed decision finding the alleged Village to be eligible to receive ANCSA benefits (Ex. BIA-1A, pp. 71-69). Notice of that proposed decision and the opportunity to protest it within 30 days was published in the Federal Register. 38 Fed. Reg. 35028 (Dec. 21, 1973).

Four parties, the Sierra Club, the Alaska Wildlife Federation, the Sportsmen's Council, and Philip Holdsworth, but not Mr. Stratman, protested the proposed decision (Ex. BIA-1A, pp. 110, 83). After consideration of the protests, the Area Director issued an Administrative Determination (final decision) dated February 8, 1974, finding the alleged Village to be eligible (Ex. BIA-1A, pp. 121-118). He separately issued Findings of Fact

## APPENDIX E-12

related thereto (Ex. BIA-1A, pp. 153-151). The eligibility determination was published in the Federal Register on February 21, 1974. 39 Fed. Reg. 6627.

The protestants therein, but not Mr. Stratman, appealed the eligibility determination to the Alaska Native Claims Appeal Board (AN CAB) (Ex. BIA-1A, pp. 128-27).<sup>1</sup> On May 16, 1974, the Alaska Wildlife Federation, the Sportsmen's Council, and Philip Holdsworth filed a notice stating that they were "unable to continue in the appeals proceedings due to lack of available personal representation, and insufficient funds to support continued legal counsel." (Ex. BIA-1A, p. 429) They requested that AN CAB "continue to consider the various legal points presented by Appellants in the material already before them in their deliberations on these matters." (*Id.*) On May 24, 1974, AN CAB issued an Order dismissing them as parties and stating that their previously filed briefs and arguments would be considered filed as amici curiae (*id.*, p. 433). On July 13, 1974, the Sierra Club withdrew its protest (*id.*, p. 445).

By Order dated August 28, 1974, AN CAB dismissed the protestants' appeals and directed

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<sup>1</sup>In the 1980's AN CAB was eliminated as a separate Departmental Board and its functions were merged with IBLA.

## APPENDIX E-13

certification of the alleged Village as eligible for ANCSA benefits (*id.*, pp. 451-449). It noted that there were no remaining parties of record adverse to the eligibility of the alleged Village and that the legal arguments advanced by the amici curiae were without sufficient merit to justify the continuance of the proceedings (*id.*). That order became a final Departmental decision upon its approval by the Secretary of the Interior on September 9, 1974 (*id.*). 43 C.F.R. § 2651.2(a)(5). Consequently, a Certificate of Eligibility was issued by the Area Director on September 24, 1974 (*id.*, p. 452), and published in the Federal Register on March 19, 1975. 40 Fed. Reg. 12527.

In 1974 the Department also certified Leisnoi as a Village Corporation for the alleged Village. Leisnoi thus became eligible to select over 115,000 acres of land under ANCSA, which it would hold and manage on behalf of the alleged Village. See Leisnoi, 154 F.3d at 1065 (citing 43 U.S.C. §§ 1611, 1613).

On July 2, 1976, Protestant and other plaintiffs filed the Federal court action which challenged the alleged Village's eligibility and which eventually resulted in the remand (referral) of the matter to this office. He also filed an administrative appeal of a January 17, 1977, BIA Decision determining the amount of lands to which Leisnoi was entitled under section 14(a) of ANCSA.

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AN CAB dismissed that appeal for lack of standing.  
Appeal of Omar Stratman, 2 AN CAB 329 (1978).

The Board recounted the history of the Federal court action in its order of referral, Omar Stratman (On Judicial Remand), IBLA 96-152, pp. 2-7, and it will not be repeated herein, except to note certain rulings. First, the United States Court of Appeals for the Ninth Circuit found that Protestant has standing, as a recreational user, to pursue the Federal court action, that he was entitled to actual notice of the alleged Village's application, and that because he did not receive such notice, he should not be barred by exhaustion of administrative remedies requirements. Stratman v. Watt, 656 F.2d 1321, 1325 (9<sup>th</sup> Cir. 1981).

Second, in a scheduling order dated May 10, 1995, United States District Judge von der Heydt identified five threshold issues as follows:

1. Whether the court should dismiss this action for failure of plaintiff Omar Stratman (hereinafter "plaintiff") to exhaust his administrative remedies;
2. Whether res judicata bars this action;
3. Whether plaintiff's second settlement agreement with Koniag, Inc., contractually

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precludes Stratman from proceeding against Leisnoi, Inc;

4. Whether Section 1427 of the Alaska National Interest Lands Conservation Act [(ANILCA), Pub. L. No. 96-487, 94 Stat. 2519-20 (1980)] constitutes congressional ratification of Leisnoi's eligibility thus barring plaintiff's action; and
5. Whether plaintiff's lis pendens should be expunged.

Judge von der Heydt then retired and the new presiding judge, James Singleton, found in an Order dated September 13, 1995, that res judicata did not bar the action, that failure to exhaust administrative remedies did not apply to the action because "the Ninth Circuit has already determined that Stratman did not have notice of the occasion to exhaust administrative remedies," and that Koniag's second settlement did not preclude Protestant's action. (Order at 2.) Referencing the concepts of ripeness and primary jurisdiction, he concluded that the case should be sent to the Board for consideration of Protestant's challenge to the certification of the alleged Village and the issue of ratification under section 1427 of ANILCA to give the Court the benefit of the agency's expertise and the agency the benefit of any intervening Congressional action.

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The Board, in turn, similarly sent the case to this office to determine in a recommended decision "whether Woody Island meets the legal requirements for eligibility for certification as a Native Village." IBLA 96-152, p. 10. In so doing, it explicitly deferred ruling on any possible controlling legal issues, such as whether Protestant lacks standing, whether the doctrine of administrative finality bars consideration of Protestant's challenge because of ANCAB's ruling in Appeal of Omar Stratman, 2 ANCAB 329, whether the Department lacks jurisdiction because of Protestant's failure to timely appeal the Area Director's eligibility determination, and whether Congress ratified the alleged Village's status as an eligible Native village by enactment of section 1427 of ANILCA.

### III.

#### Statement of facts

Many of the facts set forth in this Statement of facts were gleaned from an Investigative Case Report prepared on behalf of Leisnoi by E. Frank Feichtinger, a private investigator and former law enforcement officer (the Feichtinger Report) (Ex. L-DOC-108). The report is based upon a fairly exhaustive investigation of the history of Woody Island conducted by Mr. Feichtinger, including depositions, affidavits, and unsworn interviews of Leisnoi shareholders and other voluminous exhibits,

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adduced at hearing.

The Feichtinger Report contains a list of Natives determined by Mr. Feichtinger to be 1960's residents of the alleged Village - individuals who physically resided in the alleged Village and maintained a residence there sometime during the time period of 1960 to 1970. Mr. Feichtinger also included a list of Natives who were deemed 1970 residents - "individuals of Native ancestry, who, in 1970, considered Woody Island their home and either physically resided there or frequented there to participate in activities consistent with their culture, tradition, and heritage. All of these individuals are also related by blood or marriage to families with generational historical ties to the village."

At the hearing Leisnoi maintained that each Native whose permanent residence was the alleged Village on April 1, 1970, was listed as one of the 1970 residents in the Feichtinger Report (Tr. 2330). In its posthearing briefs Leisnoi apparently has changed its position, arguing that Mr. Feichtinger's list does not include all of the permanent residents on April 1, 1970.

Contributions to the Feichtinger Report were made by several people, including Christopher B. Wooley, an anthropologist specializing in shoreline and archeological survey and cultural resource

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management, and Dr. Nancy Yaw Davis, an expert in the field of cultural anthropology in the area encompassing Woody Island. Both Mr. Wooley and Dr. Davis reviewed depositions and other materials collected by Mr. Feichtinger (Tr. 2290-92, 3443-44, 3454). Mr. Wooley also examined Woody Island for physical evidence of use and occupancy and interviewed two Leisnoi shareholders (2312, 2333-34). Dr. Davis conducted her own research, visited Woody Island three times, and interviewed 30 to 35 people (Tr. 3443-46, 3454-56). Mr. Wooley and Dr. Davis testified at the hearing, commended Mr. Feichtinger's work, and agreed with the lists he generated (Tr. 2299, 3454-55).

However, not all statements by Mr. Feichtinger in his report or in his testimony are accepted as reliable and probative, as some proved to be inaccurate, misleading, or so vague or unsubstantiated as to be of little probative worth. These inaccuracies may be attributable, in part, to the fact that his collection of interviews and affidavits was limited mostly to Leisnoi shareholders (Tr. 1259) and that memories of interviewees dimmed since the crucial time period of the decade ending in 1970.

Woody Island is located approximately 1 mile east of Kodiak, Alaska, which is situated on the east shore of Kodiak Island (Exs. L-CHART-26; L-DOC-A2; L-BOOK-77, p. 47). The short boat ride

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from Kodiak to Woody Island takes only 5 to 30 minutes (Armstrong Depo., p. 109-10; Exs. S-6D, p. 28; S-6J, p. 10; Tr. 264).

Woody Island is a heavily forested island approximately 2.8 miles long from north to south and 1.8 miles wide. The west side of Woody Island, as compared to Kodiak, receives several more hours of sunlight in the growing season because of the positions of those areas relative to mountainous terrain. Consequently, the west side of Woody Island is a better place to garden, and many Natives have maintained gardens on Woody Island over the years.

There are numerous lakes on Woody Island, including Icehouse Lake and Tanignak Lake, which are located near the western shore of the island (Ex. S-42). These lakes are also known, respectively, as Lower Lake and Upper Lake.

A report prepared by Mr. Wooley numbers various sites on Woody Island where Native homesites exist or once existed (Ex. L-DOC-A9a). Sites 4 through 8 are located immediately north of Lower Lake in an area sometimes referred to as the North Village area. Sites 10 and 11 are located still farther north along the northwestern shore in a location referred to as the Garden Beach area. The North Village and Garden Beach areas are now owned by the Kodiak Island Borough (Ex. S-42; Tr.

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2256-63). Sites 16 through 20 and 23 are located immediately south of Lower Lake in an area often called the South Village area. Finally, Site 28 is located near Sawmill Point on the northeastern shore.

Site 4 is referred to as the Pavloff homesite. It lies within U.S. Survey 1676, a 1926 survey for the homestead of Nicholai Pavloff (1846-1932) which he never perfected. Numerous people occupied the homes there at various times (see, e.g., Exs. L-DOC-96, -124, -346; Tr. 1342-45, 2682-84, 2690). One structure, referred to as the Big Pavloff house, was used by Angeline Panamariof Pavloff Maliknak and her family from approximately 1960 until it burned down in 1965 or 1966 (Ex. S-60, pp. 8-9, 13-15).

Site 6 is called the William Pavloff/Angeline Panamariof Pavloff Maliknak homesite, as Angeline, along with her first husband, William Pavloff, her second husband, Stephan Maliknak, and her children, were the primary users of this house before they moved to the Big Pavloff house (see, e.g., Tr. 1573-73; Ex. L-DOC-346). The homesite lies immediately south of U.S. Survey 1676 (Tr. 2256; Ex. S-42). The house was no longer standing by 1960 (Tr. 1332-33).

Site 5 is referred to as the Sundberg homesite, as the Sundberg family, descendants of

## APPENDIX E-21

Nicholai Pavloff, were the principal users of the house there, at least prior to 1944 (Ex. L-DOC-73, -96, -122; Tr. 2712). The homesite lies within U.S. Survey 1676 and the house collapsed in 1986 (Exs. L-DOC-96; S-42; Tr. 2256).

Site 7 is referred to as the Frump homesite, as Agnes Pavloff Frump and her family occupied the house there from 1960 to 1963. However, Mitch Gregoroff and Kelly Simeonoff, Jr. testified that the Sundberg house and Frump house are one in the same (Tr. 1406, 2682-83). The Frump house was in disrepair but still standing and probably occupied by Johnny Maliknak and Nicholas Pavloff in 1970 (Tr. 498-99, 1332-33, 1609-10; Ex. S-6O, pp. 8-15).

On Site 8 three homes were built by the Kodiak Area Native Association (KANA) in the early 1970's, one each for Johnny Maliknak, Nicholas Pavloff, and Rudy Sundberg, Jr. (Tr. 161, 1332-34).

Site 10 is referred to as the Georgi Nekeferoff homesite in recognition of the man who used the small cabin there (see, e.g. Ex. L-DOC-73). Site 11 is known as the Nicolai Maliknak/Paul Wolkoff homesite, as the named gentlemen lived in a home there until their deaths in a boating accident in the late 1950's (Ex. L-DOC-346; Tr. 1342). Although Mr. Feichtinger opined that the small cabin on Site 10 was still standing in 1970, the evidence shows

## APPENDIX E-22

that neither that cabin nor the home on Site 11 were standing by 1970 (Tr. 1335-36, 1980-83, 2879-80).

Site 28 is called the Naughton homesite because Charles Naughton sometimes camped in the small, dilapidated cabin located there. Most likely the cabin was not standing in 1970 (compare Tr. 163, 493, 1949-50 with Ex. L-DOC-385).

Site 17 is named the Harmon homesite, as the Harmon family lived in a house there in the 1950's. Mr. Feichtinger acknowledged that the house was not being used in 1970 (Tr. 1337) and, in fact, it was not even standing by 1970 (Tr. 1931-32).

Site 18 is known as the Gabe Lowell homesite, as Mr. Lowell lived in a house there in the early 1950's. It probably was not standing in 1960 and had definitely fallen down by 1970 (Tr. 1337-38).

Site 19 is called the Chabitnoy house. It derives its name from the long-time resident and owner of the house, Ella Fadaoff Chabitnoy. Nicholai Litnik (Chief Yellow Pants) gave the house to Ella and Nicholas Fadaoff in approximately 1920. After Nicholas died, Ella retained the house and married Mike Chabitnoy. The house was standing and habitable in 1970 (Tr. 1944, 1972, 2753).

## APPENDIX E-23

Site 20 is referred to as the Simeonoff house because the Simeonoff family members were the principal users of the house there. The house is close to the Chabitnoy house and gardens were maintained by the occupants of both houses. By 1970 the Simeonoff house was more run down than the Chabitnoy house, but it was still standing and habitable (Tr. 1339, 1349-51, 1357, 1945, 1972; Ex. S-6O, p. 76).

Site 23 is named the Fadaoff/Madsen homesite, as Edson Fadaoff, Sr. built the house there in the 1950's, and Roy Madsen bought the house and acquired title to the land in the 1970's (unsurveyed portion of U.S. Survey 603, Tract B). The house there was barely habitable in 1970 (compare Tr. 234; Exs. L-DOC-173, -174, with Tr. 1946, 1986), and back taxes of approximately \$365.00 were owed on the house when Mr. Madsen purchased from Edison Fadaoff Jr. and Joseph Fadaoff their interests in the house in 1971 or 1972 (Tr. 2884-87).

The Harmon, Chabitnoy, and Simeonoff houses are located within U.S. Survey 3630 (Tr. 3003-04). The 8.48 acres of land described by that survey were patented to Ella Chabitnoy on March 11, 1964 (Exs. L-DOC-301; S-45). In May 1971 she sold the land to Fred and Ruth Brechan, who are non-Natives, for \$2,500 (id.; Tr. 2888-89).

## APPENDIX E-24

The Alutiiq people have been inhabiting and using Woody Island for thousands of years (Ex. L-DOC-A9, p.1). Mr. Wooley's report briefly describes the history of those Natives, from a period of rich resource harvesting, to a period of whaling, fishing, wood-working, sweat-baths, extensive trade, large multi-roomed houses, and large villages with complex social ranking, including chiefs, and rich ceremonials (id.).

Then, in the late 1700's, the Russians subjugated the Native population in the region. Epidemics, forced relocations, and extermination of those who resisted, characterized the initial wave of foreign influence (id., p. 2; Tr. 2159-60).

In 1805 there was a settlement on the east side of Woody Island and the Native population numbered 54 (Exs. L-BOOK-5, -58, -65). In 1837, the region suffered a smallpox epidemic. The Russians resettled the survivors into seven amalgamation villages, one of which was on Woody Island (Exs. L-BOOK-31, L-DOC-431; Tr. 2159-60).

By 1849 a Native settlement was located on the west side of the island near a location now known as Icehouse Point (Ex. L-BOOK-5, -77). Both Icehouse Point and Icehouse Lake derive their names from an ice harvesting and warehouse operation which began on the island in 1852.

## APPENDIX E-25

The operators, the Russian American Company and the American Russian Company, employed the Natives of Woody Island to harvest and warehouse ice from Tanignak Lake. In 1855 the Natives were resettled from scattered settlements around the island to the west side near the ice harvesting operation (Ex. L-DOC-108, pp. 14-15).

During the 1800's many of the Native inhabitants of Woody Island earned a living cutting and storing ice for these companies during the winter, and hunting sea otters during the summer for their highly prized fur. By 1890 the sea otter industry began to decline because hunting was decimating the sea otter population. In 1911 sea otter hunting was prohibited to protect the remaining population.

The Natives also seasonally used Woody Island and various outlying areas for subsistence purposes (Tr. 2264-69). It was a somewhat fluid society, with Natives sometimes living elsewhere with relatives and/or while gathering wild foodstuffs (id.). On Woody Island they gardened, fished, harvested shellfish, picked berries, gathered other edible plants, and hunted rabbits, seals, and octopus. Elsewhere they engaged in hunting deer and elk as well as the aforementioned activities.

## APPENDIX E-26

By 1872 a Russian Orthodox Church was located on Woody Island. Throughout the region the Church came to be a central village institution (Tr. 2164-65, 3424, 3586-90). The influence of the Church over the Natives' lives was and is very strong in the region (Tr. 2150, 2156; Armstrong Depo., p. 130).

Prior to World War II, the alleged Village had a chief, but the chief had little power (Ex. L-DOC-350; Tr. 2822-23). After the war Woody Island no longer had a chief or any tribal organization or government (Tr. 494, 1246-47, 2759, 2822-23).

The Russian Orthodox Church exerted much influence over the Natives' lives through peer pressure and other mechanisms (id.). A lot of Natives were members of the Church (Tr. 588). Most social functions were Church-related, including masquerading at the beginning of each new year and caroling at Christmas time (Exs. L-DOC-1, -350; Tr. 2792-93). Such activities ceased during World War II and were never resumed on Woody Island.

By 1951 or 1952 the Russian Orthodox Church building on Woody Island had become so dilapidated that it was torn down and never replaced (Tr. 3580, 3605; Exs. L-BOOK-14, -15). In contrast, the Church continued to be the main

## APPENDIX E-27

communal organization for Natives living in Kodiak through the 1960's (Tr. 1771).

By 1886 Woody Island was the center of commercial activity in the Kodiak Islands, being home to a boat yard, the ice harvesting operation, a grist mill, the operations and wharf of the Alaska Commercial Company, and the only roads in Alaska. In 1891 the North American Commercial Company, a fur trading enterprise, established operations there, including a store.

In 1893 the first Baptist Mission in Alaska was built on the west side of Woody Island, serving primarily as an orphanage. It began operation of the only school on Woody Island. In 1896 a Baptist chapel was built.

During its existence the Mission cared for hundreds of children - many orphans - who came from various locations in Alaska. Many of the children continued to reside on Woody Island as adults. They, and their descendants, comprise a large number of the enrollees to Woody Island.

From 1879 to 1900 the island's predominately Native population, exclusive of the Mission children, varied from 167 to 117. In 1903 the North American Commercial Company closed its operations, including the store, on Woody Island. Woody Island has not had a store since.

## APPENDIX E-28

In approximately 1905, the Territorial Government began operating a school on Woody Island known as the Longwood School (Ex. L-DOC-74). It offered schooling for grades K-8 until 1928 when it began offering high school classes as well.

In 1911 the U.S. Navy built a wireless station on Woody Island. On February 28, 1931, the wireless station was decommissioned and shortly thereafter the Territory of Alaska was given permission to use the associated buildings for the Longwood School (Ex. L-DOC-A2).

In 1910 Woody Island's population, including children at the Baptist Mission, was 168. In 1912 the Katmai volcanic eruption dropped ash 18 inches thick over Woody Island, causing many families to leave the island (Tr. 2729). In 1918 at least 27 Woody Island villagers and Mission children died during the Spanish flu epidemic. By 1920 the population of Woody Island had dropped to 104.

By 1937, according to a 1971 Kodiak Island Times newspaper article, the bulk of the townsite on Woody Island had been abandoned as people moved to what is now the City of Kodiak (Ex. L-DOC-113). Long-time Woody Island resident Ella Chabitnoy confirmed that most of the island residents left before World War II (Ex. L-DOC-74).

## APPENDIX E-29

The newspaper article further states that when the Baptist Mission burned down in 1937, it was relocated to a situs on Kodiak Island where more services could be provided to the Mission children (Ex. L-DOC-113). There, a new facility was constructed in 1938 (id.). By the time all of the Mission children were transferred to the new facility in 1939, the population of Woody Island had dropped to 54. The enrollment in Longwood School had dropped from 71 in 1937 to 20, and the school was closed (Exs. L-DOC-351, -420, -A2).

Apparently, the Bureau of Indian Affairs then operated a school on Woody Island for a few years before that school also closed in approximately 1943 (Exs. L-DOC-350, -351; Tr. 2671). Another long-time Woody Island resident, Natalie Simeonoff, stated that many people left Woody Island by the early 1940's because of the school closing and the lack of employment opportunities on the island (Ex. L-DOC-350).

By 1944 the island's Native population was down to 37 (Ex. L-DOC-421). Ms. Simeonoff compared the depopulation of Woody Island to the depopulation of rural areas in the Lower 48 States in that people gradually became less dependent on the land for subsistence, buying more and more of their food, and eventually moved to the cities to earn a living (id.).

## APPENDIX E-30

She elaborated that many people moved to Kodiak, attracted by the lure of new high-paying jobs that materialized after the U.S. Navy began constructing a naval base seven miles from Kodiak in 1939 (id.; Ex. L-DOC-56). The concomitant appearance of a hospital, doctors, schooling beyond grade eight, electricity, and more stores and businesses also made Kodiak a more attractive place to live (Exs. L-DOC-351; L-BOOK-15). In comparison, Woody Island did not have any medical care, electricity, stores, or employment opportunities (id.). Electric lines were not run to Woody Island until the 1960's (Tr. 449).

In 1939 the population of Kodiak stood at approximately 450 (id.). During World War II, its population swelled to 4,000 before dropping down to 2,000 by 1950 (id.).

After the war, daily air service and regular steamship service to Kodiak were established (Ex. L-DOC-56). Also, new sewer and water systems were constructed (id.). By 1956 Kodiak's population had risen to 3,000. By 1966 there were 18 seafood plants in Kodiak and 8 more at other points on Kodiak island (Ex. L-DOC-56). In 1967 the town's population reached 7,500 (id.).

Woody Island was also the site of Federal Government activity during the 1940's. In 1942 the Navy constructed numerous buildings on the west

## APPENDIX E-31

side, including barracks for 200 men on the south and east shores of Icehouse Lake. It also installed a running water and sewer system (Ex. S-43). Beginning in approximately 1956, the Kodiak Baptist Mission used many of those buildings to host a youth summer camp known as Camp Woody. The Navy also built a sawmill at Sawmill Point on the northeast part of the island. It closed its operations on Woody Island in 1945. (Ex. L-DOC-A2)

In 1941 the Civil Aeronautics Administration (CAA), later known as the Federal Aviation Administration (FAA), established an airways communication station on the east side of Woody Island. It also built a dock on the west side and began a ferry service from Kodiak to Woody Island in 1948. That ferry later became known as the FEDAIR IV.

The CAA/FAA employees and their families lived in Government-constructed housing on both the west and east sides of the island. Each side had its own Government-built running water system. The west side system drew water from the Tanignak Lake and pumped it through piping to a water tank. That same piping also fed water to the buildings later used as Camp Woody. From the water tank ran two additional lines of piping, one to the dock and one to the South Village. (Ex. L-DOC-347; Tr. 1445-46, 1933-36, 2775)

## APPENDIX E-32

Eventually, all FAA personnel were moved to the east side, where the FAA housing grew to include eight houses (Ex. L-DOC-134), a dormitory and two 5-unit apartment buildings. In 1951 a K-8 grade school was built on the east side. Nevertheless, by the early 1950's, educational, religious, medical, and employment services or opportunities for Natives were dramatically better in Kodiak than on Woody Island, as Woody Island had no high school, church, medical service, or businesses (Tr. 2165-66, 2752).

By the mid-1950's Woody Island's population consisted of 21 FAA families living on the east side and 4 Native families living on the west side, including the Harmon's, Simeonoff's, and Chabitnoy's (Ex. L-DOC-420). Because of the lack of employment opportunities there for the non-FAA Natives, most of them earned their living as fishermen (Tr. 2732-33, 2749).

The island's population, including the CAA/FAA families, was 111 in 1950 and 78 in 1960. The population of FAA employees and dependents reached as high as 70 people (Ex. S-6D, p. 29).

By the late 1950's, the Simeonoff, Chabitnoy, Fadaoff/Madsen, and Harmon houses were all plumbed and connected to the running water line that ran down to the South Village. Prior to that time the occupants of those houses relied on several

## APPENDIX E-33

wells and springs for their water supply. The other Native households without running water continued to rely upon the wells and springs and Tanignak Lake for water. (Exs. S-6F, pp. 22, 30; L-DOC-129, -146, -176, -347; Tr. 172-73, 995-96, 1242-45, 1408-14, 1445-49, 1649, 1935-36, 2774-75, 2824).

By 1963 FEDAIR IV annually was running 2,000 times between Woody Island and Kodiak and carrying 8,000 to 9,000 passengers plus freight (Ex. L-DOC-434). Those passengers included teenagers who commuted from Woody Island to Kodiak each weekday to attend high school, as Woody Island did not have a high school.

On April 12, 1963, the Kodiak Mirror published an announcement from the FAA that the use of the FEDAIR IV would be restricted to FAA employees, their families, regular residents of Woody Island, guests invited by FAA employees, or persons with prior permission from the FAA station manager (Ex. L-DOC-433). However, this restriction was not strictly enforced, as non-FAA persons who were not regular residents were able to continue using the ferry (see, e.g., Exs. L-DOC-129, -132, -437, -438; Armstrong Depo., p. 149; Tr. 2827).

On March 27, 1964, an earthquake and several tidal waves struck the Kodiak archipelago. As a result, parts of Woody Island sunk or rose

## APPENDIX E-34

several feet, the Lower Lake became a saltwater lagoon, the clam beds on the island were temporarily lost, the FAA dock was destroyed, and the running water system may have been damaged (Exs. S-6O, pp. 65-66; L-DOC-129; Tr. 606-07, 992, 1410-12, 2754-56). However, no buildings were damaged (Tr. 173, 1939-40; Exs. S-6O, p. 66; S-6D, pp. 14, 19).

Woody Island sustained relatively little damage as compared to Kodiak, which suffered severe damage, and several villages which were essentially wiped out (see, e.g., Tr. 3593-95, 3601-03). The Native populations of those villages were relocated (see, e.g., id.).

The FAA quickly replaced the destroyed dock on Woody Island with a narrower and shorter dock. The shortness of the dock rendered it less safe than the old dock for mooring because the currents and tidal action were stronger closer to shore. A boat tied to the dock was at risk of being smashed apart against the dock or pilings so that no one tied up to the dock overnight. (See, e.g., Ex. S-6O, p. 65; Tr. 606-07, 1361-62, 2005-07). In general, Woody Island has lacked a safe harbor or moorage throughout its history (see, e.g., Ex. L-DOC-129, -132, -173, -174).

Nevertheless, Woody Island remained accessible by boat from Kodiak or elsewhere, as it

## APPENDIX E-35

has been throughout its history. Small boats could be dragged up on the beach near the dock or elsewhere. While the earthquake caused a loss of beach area that made this process somewhat more difficult, small boats could be and were often pulled up on the beach both before and after the earthquake. Also, boats could be moored by running lines to the beach.

However, it has always been difficult to access Woody Island in winter or bad weather, as the passage is dangerous in a small boat and there is no safe place to moor a larger boat, especially overnight. Consequently, the ferry service provided by FEDAIR VI (a larger and safer boat) was particularly valuable in inclement weather. (Exs. L-DOC-1, -129, -132, -173, -174, -344, -346, -350, -437, -438; S-6D, pp. 50-51, 54; Armstrong Depo., pp. 105-06, 108-09, 122-23, 153; Tr. 408-11, 665-66, 1762, 1774, 2112-13, 2118, 2127-29, 2787-88, 2824, 3086-87, 3128-29, 3132-34, 3215).

The earthquake may also have damaged the running water system. There are statements and testimony from Natives that the earthquake broke the endcap off the pipeline that terminated at the dock so that the water could not be retained in the water tank but drained away, rendering the system nonfunctional. However, Christina Hoen testified that the system was working when she moved to Woody Island shortly after the earthquake and that

## APPENDIX E-36

the endcap did not break until the fall of 1964 (Tr. 2971-72). James Hartle also testified that there was running water after the quake (Tr. 1649). Christina was not sure if the break was caused by an aftershock (Tr. 2972). It is possible that the break was attributable to other causes, such as the fact that the pipe, being wooden and old (Tr. 1942-43; Ex. L-DOC-129), may have worn out.

In the mid- to late-1960's, the Borough of Kodiak Island began taxing property on Woody Island (Tr. 2753, 2964; Ex. L-DOC-129). The Simeonoff's paid taxes on the Simeonoff house (*id.*).

In 1969 the FAA began phasing out its operations on Woody Island and moving its operations and personnel to Kodiak. On May 27, 1969, the Woody Island school was closed because of the planned and ongoing removal of FAA personnel, as there would no longer be a sufficient number of children (10) to justify operation of a school there.

No non-FAA children had attended the school since approximately 1965, when the last two non-FAA children, Edison and Joseph Fadaoff, left the island. In the 1960-61 and 1961-62 school years, Joseph Fadaoff was the only non-FAA child attending school on Woody Island. Additionally, throughout the decade ending in 1970, there were no children of high school age living on Woody

## APPENDIX E-37

Island. (Exs. L-DOC-337, -420; S-6D, pp. 20-21; Tr. 180-82, 193, 233, 403, 428, 627, 655, 1057, 1290, 1941-42).

After the school closed, FEDAIR IV ran much less frequently. In May 1971 the FAA began limiting use of FEDAIR IV to FAA personnel, their dependents, and official visitors only. By 1973 the last FAA family had vacated Woody Island. (Exs. L-DOC-107, -183, -417; S-6O, pp. 64-65; Armstrong Depo., p. 162).

In approximately 1972 KANA built three cabins in the North Village area, one each for Johnny Maliknak, Nick Pavloff, and Rudy Sundberg, Jr. In 1974 Leisnoi began seeking acquisition of or permission to use the abandoned FAA facilities as housing for its shareholders (Ex. L-DOC-165). In 1977 and 1978 Leisnoi spent over \$300,000 to renovate the former FAA housing facilities (Ex. L-DOC-164). On December 12, 1979, a fire essentially destroyed the renovated housing (Exs. L-DOC-134, -419; Tr. 3154-55). Before the fire, several people occupied the housing. Most of them were persons working on the renovation project and their family members, including Fred Zharoff and his family (Armstrong Depo., p. 162-63; Ex. L-DOC-438). Joanne Holmes, Mervin Brun and his family, and Betty and George Wallin were identified as occupants for unknown periods of time (Ex. L-DOC-438; Tr. 3080).

## APPENDIX E-38

Richard Simeonoff is the only Native who returned to Woody Island to live subsequent to the 1979 fire (Tr. 2181). In 1996 Leisnoi again began plans to settle the east side of Woody Island but has been hampered by Kodiak Borough zoning laws and a Lis Pendens filed on the property by Protestant.

Leisnoi focused upon developing housing on the east side of the island because that was the only portion of Woody Island available and patented to Leisnoi under ANCSA. Most of the island, including the western half where the village existed into the twentieth century, was not available because of land grants to other entities or individuals. Stratman Exhibit 42 shows the land ownership of the island.

## IV.

### Discussion

It is noted, as a preliminary matter, that the parties are in dispute as to whether certain decisions issued by ANCAB may be relied upon for guidance in the instant case. Those 11 decisions found the purported Native villages of Uyak, Litnik, Salamatof, Anton Larsen Bay, Uganik, Bells Flats, Ayakulik, Port Williams, Solomon Bearing Straits, Alexander Creek, and Pauloff Harbor ineligible to take land and other benefits under ANCSA. Each of those decisions was issued after hearing and

## APPENDIX E-39

briefing before an administrative law judge (ALJ) and issuance of a recommended decision by the ALJ. However, the parties were not permitted to take exceptions to the ALJs' recommended decisions and to submit briefs thereon to ANCAB.

In Koniag, Inc. v. Kleppe 405 F.Supp. 1360 (D. D.C. 1975), aff'd in part and rev'd in part, Koniag, Inc. v. Andrus, 580 F.2d 601 (D.C. Cir. 1978), 10 of those ANCAB decisions were set aside and remanded to the Secretary to permit the parties to take exceptions to the ALJ's recommended decisions and to submit briefs thereon to ANCAB. Id. at 609. The ALJ recommended decisions themselves were not attacked and were accordingly not disturbed. Id. n.8. The remaining ANCAB decision pertaining to the alleged Village of Pauloff Harbor was reversed and that village was found eligible. While the 11 ANCAB decisions were set aside and thus lack precedential value, those decisions and the undisturbed ALJ recommended decisions have been utilized for guidance where their logic appears reasonable and applicable to the case at hand.

### A.

#### **Motions to Dismiss**

At the close of Protestant's case-in-chief, Leisnoi and Koniag indicated that they wished to

## APPENDIX E-40

make certain motions. To conserve time for testimony, the parties agreed to delay presentation of and responses to the motions until filing of the posthearing briefs (Tr. 2664-69). It was further agreed that Leisnoi and Koniag would not waive any rights by agreeing to the delay (id.).

Pursuant to this agreement, Leisnoi, in its posthearing briefs, has moved to dismiss Protestant's challenge to the alleged Village's eligibility on the following grounds: (1) Protestant lacks standing to maintain an administrative action; (2) ANCAB determined in the case of Appeal of Omar Stratman that Protestant lacked standing to challenge the alleged Village's eligibility, that decision became final when he did not appeal it, and therefore the doctrine of administrative finality precludes his present challenge; (3) jurisdiction is lacking because Protestant failed to timely appeal the eligibility determination of the Area Director within 30 days after he acquired actual knowledge that the alleged Village had been certified as eligible; (4) Congress ratified the alleged Village's status as an eligible Native village by enactment of section 1427 of ANILCA; (5) Protestant failed to overcome the presumption that those persons on the certified Native Roll for the alleged Village are residents of the village; (6) Protestant failed to meet his burden of proof to establish that the Area Director's eligibility determination was incorrect. Koniag has similarly moved for dismissal upon the

## APPENDIX E-41

ground that Protestant failed to meet his burden of proof. BIA filed short briefs joining Leisnoi and Koniag in the contentions set forth in their briefs.

In response, Protestant correctly notes that the District Court specifically instructed the Board to determine the issues of whether the alleged Village satisfied the criteria for eligibility as a Native village and whether its eligibility was legislatively ratified by section 1427 of ANILCA. He argues that the Board, and hence this office, have a duty to comply with the District Court's instructions, regardless of whether Protestant would have been barred, based upon one or more of grounds (1) through (3) raised by Leisnoi, from pursuing this matter in an administrative appeal.

He is correct, as an agency, on remand of a matter from a court, must obey the court's mandate and directions without variation and, if the cause is remanded with specific directions, further proceedings before the agency must be in substantial compliance with such directions. See Mefford v. Gardner, 383 F.2d 748, 758-59 (6<sup>th</sup> Cir. 1967); see also Animal Protection Institute of America, 118 IBLA 63, 70 (1991) (the Board has no authority to clarify, alter or amend orders issued by a Federal district court). This holds true even if the directions are erroneous. Mefford, 383 F.2d at 759.

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Moreover, the direction to determine the eligibility of the alleged Village was reiterated by the Board, which specifically deferred ruling on any of the potentially controlling legal issues which Leisnoi once again raises as grounds (1) through (4) for dismissal. The clear import of the Board's Order is that the scope of this Recommended Decision should be limited to determining the eligibility of the alleged Village and that the potentially dispositive legal issues, such as those raised as grounds (1) through (4), are to be addressed within the Department, if at all, by the Board and not this office. This follows from the Board's explicit deferral from ruling on those issues and its direction that the parties shall have the opportunity to file briefs registering their objections to the Recommended Decision and "address[ing] any legal issues considered by the parties to be case dispositive." IBLA 96-152, p. 11. The implication is that the Recommended Decision is not to address the potentially dispositive legal issues, but only and certainly the eligibility of the alleged Village. At the beginning of the hearing Leisnoi agreed that such was the proper course of action (Tr. 51).

This office is bound to follow the directions of both the District Court and the Board to determine the eligibility of the alleged Village, leaving to the Board and/or the District Court resolution of the potentially dispositive legal issues raised by Leisnoi in grounds (1) through (4) for dismissal. As to

## APPENDIX E-43

grounds (5) and (6) for dismissal, the issues of proof raised therein are addressed in Subparts 2 through 5 of Part D of this Section, which pertain to the issue of the alleged Village's eligibility.

### B.

#### **Is Protestant collaterally estopped from raising certain arguments or issues?**

Respondents argue that Protestant is collaterally estopped from raising certain arguments or issues allegedly raised and rejected by ANCAB in addressing the appeals of the Area Director's February 8, 1974, Administrative Determination of the alleged Village's eligibility. Those appeals were filed by the Sierra Club, the Alaska Wildlife Federation, the Sportsmen's Council, and Philip Holdsworth. All of them subsequently withdrew their appeals and ANCAB issued an Order dismissing the appeals, noting that there were no remaining parties of record adverse to the eligibility of the alleged Village and that the legal arguments advanced by them were without sufficient merit to justify the continuance of the proceedings.

Protestant is not collaterally estopped by ANCAB's Order of dismissal for at least three reasons. First, it does not appear that ANCAB adjudicated the merits of the arguments raised in that case or that the issues raised were actually

## APPENDIX E-44

litigated and necessarily decided, after a full and fair opportunity for litigation. See Annaco, Inc. v. Office of Surface Mining Reclamation and Enforcement, 119 IBLA 158, 164-66 (1991) (collateral estoppel applies only if an issue is actually and necessarily determined after a full and fair litigation of the issue, and a dismissal without prejudice did not constitute a final judgment on the merits or a determination of any issue raised). Second, Protestant was not a party to the case before ANCAB and therefore cannot be collaterally estopped by any determinations made therein unless one of the parties to that case was a "virtual representative" of Protestant. Triple R. Coal Co. v. Office of Surface Mining Reclamation and Enforcement, 126 IBLA 310, 318 n.5 (1993). This contemplates an express or implied legal relationship by which one of the parties to that case was accountable to Protestant. Id. No such relationship existed. Third, Protestant's interests were not adequately represented by the parties to that case because they withdrew their appeals. See 18 Moore's Federal Practice § 132.04[1][b][iv] at 132-149.

### C.

#### **Should Protestant's brief filed in state court litigation be admitted into evidence posthearing?**

In its posthearing answering brief, Leisnoi

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moves to admit into evidence a brief filed by Protestant in state court litigation. Leisnoi so moves because the brief is allegedly relevant to the issue of Protestant's standing.

Because the standing issue is not before me, I decline to rule upon the motion. The motion is best addressed by the tribunal which will determine the standing issue, i.e., the Board.

### D.

#### **Eligibility of the Native village of Woody Island**

##### 1.

#### **Burden of proof and the prima facie case**

In its Order of referral, the Board held:

Under the regulations at 43 C.F.R. § 2651.2(a)(9), "[a]nyone appealing a decision concerning the eligibility or ineligibility of an unlisted Native village shall have the burden of proof in establishing that the decision is incorrect." In this case, Stratman has that burden.

Therefore, the Government shall have the burden of going forward with

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sufficient evidence to establish a prima facie case in support of eligibility. Introduction of the BIA certification case file and the subsequent ANCAB Order should be adequate to satisfy that burden.

Stratman will then be required to establish that the eligibility Decision was incorrect [by] a preponderance of the evidence \* \* \*.

IBLA 96-152, p. 10. Therefore, Protestant has the burden of establishing that the alleged Village fails to meet one or more of the requirements of ANCSA and its implementing regulations.

It is not clear whether the Board's allocation of the burden of proof is consistent with the following allocation which was routinely applied by ANCAB when resolving appeals of village eligibility determinations:

- a. Villages listed in the Act are rebuttably presumed to meet the requirements of eligibility;
- b. Persons who appear on the Roll of Alaska Natives as residents of a named village are rebuttably presumed to be residents of the village named for

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purposes of village eligibility determinations;

- c. The burden is on the [protestant], if he contends that either of the above presumptions are inapplicable, to produce evidence sufficient to raise a substantial doubt about the validity of the challenged presumption;
- d. If the [protestant] has produced evidence . . . that raises a substantial doubt about the validity of any of the above presumptions, the burden is upon the respondent to produce evidence sufficient to sustain the findings of the Area Director that the village is eligible;
- e. After consideration of all of the evidence produced by the [protestant(s)] and the respondent(s), the Board will find in favor of the Area Director's determination unless persuaded by a preponderance of the evidence to the contrary.

U.S. Forest Service v. Village of Eyak, ANCAB VE 74-75, VE 74-81, VE 74-89 (Dec. 10, 1974) at 5. The ANCAB determination, unlike the Board's present holding, seemed to contemplate evidence being first

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presented by Protestant to overcome the presumption of residency prior to the Government's presentation of its *prima facie* case.

Following the Board's lead, I find that the introduction of the BIA certification case file and the subsequent ANCAB Order establishes a *prima facie* case of Woody Island's eligibility and that the presumption of residency comes into play in determining whether the evidence presented by Protestant preponderates over that presented by the BIA, Leisnoi, and Koniag (hereinafter collectively referred to as "Respondents"). The rebuttable presumption of residency derives from 43 C.F.R. § 2651.2(b)(1), which provides, "A Native properly enrolled to the village shall be deemed a resident of the village." ANCAB interpreted this regulation as creating a rebuttable presumption that persons who appear on the Roll of Alaska Natives as residents of a named village are residents of that village for purposes of village eligibility determinations. Alaska Wildlife Federation and Sportsmen's Council, Inc. v. Natives of Afgonak, Inc., ANCAB VE 74-7, VE 74-8 (June 10, 1974) at 11-12. If Protestant raises a substantial doubt as to the validity of this presumption, then the presumption disappears and Woody Island's eligibility is determined as if no presumption had ever been applicable. Bureau of Sports Fisheries & Wildlife v. Village of Pauloff Harbor (Sanak), ANCAB VE 74-92, VE 74-93, VE

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74-94 (June 9, 1974), ALJ's Recommended Decision, at 12-13.

### 2.

**Did the alleged Village have 25 or more Native residents as of April 1, 1970, and did at least 13 persons who enrolled to the alleged Village use it during 1970 as a place where they actually lived for a period of time?**

Protestant contends that the alleged Village does not meet any of the eligibility requirements, including the requirement of having had 25 or more Native residents on the 1970 census enumeration date (April 1, 1970) as shown by the census or other evidence satisfactory to the Secretary, see 43 U.S.C. §§ 1602(c), 1610(b)(3); 43 C.F.R. § 2651.2(b)(1), and the requirement that at least 13 persons who enrolled to the alleged Village used it during 1970 as a place where they actually lived for a period of time. 43 C.F.R. § 2651.2(b)(2). Whether the alleged Village met the first requirement is an issue distinct from the issue of whether it met the second requirement. Nevertheless, the issues are addressed together to avoid repetition of voluminous facts which bear upon both issues.

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a.

### **Guidelines for determining whether at least 13 persons who enrolled to the alleged Village used it during 1970 as a place where they actually lived for a period of time**

Several basic principles apply in determining whether "at least 13 persons who enrolled [to the alleged Village] used the village during 1970 as a place where they actually lived for a period of time." 43 C.F.R. § 2651.2(b)(2). The first principle is obvious from the wording of the regulation: a person may qualify as one of the 13 only if that person enrolled to the alleged Village.

Protestant argues that this principle should be extended so that persons who improperly enrolled to the alleged Village cannot qualify. According to Protestant, they are properly enrolled only if it is determined that they were, in fact, permanent residents of the alleged Village on April 1, 1970.

Protestant's argument cannot be sustained. Assuming, arguendo, that "properly enrolled" means that which Protestant contends it means, the term "properly enrolled" is not used in the pertinent regulation, 43 C.F.R. § 2651.2(b)(2). The term "enrolled" is used without a qualifying adverb. Subparagraph (1) of the same regulation does use the term "properly enrolled". Its presence in

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subparagraph (1) and absence in subparagraph (2) is strong evidence that the promulgators of the regulation did not intend for the term "enrolled" in subparagraph (2) to mean "properly enrolled".

The second principle is that a person must have lived at the alleged Village site, and not somewhere else on the island, in order to qualify as one of the 13. See State of Alaska v. Village of Litnik, ANCAB VE 74-25, VE 74-96, VE 74-101, VE 74-102, VE 74-106 (Sept. 25, 1974), ALJ's Recommended Decision, at 32, 35-36. That site is the North Village, South Village, and Garden Beach areas.

Third, the alleged Village is not disqualified for failure to meet the occupancy requirement of at least 13 enrollees having lived there for a period of time in 1970 if the alleged Village "is known as a traditional village" and if it was "temporarily unoccupied in 1970 because of an act of God or government authority occurring within the preceding 10 years." 43 C.F.R. § 2651.2(b)(2). As discussed in Subpart IV, D, 3 below, this "act of God" proviso does not apply and therefore the alleged Village must meet the occupancy requirement.

The determination of whether that requirement was met depends upon the meaning of the phrase "lived for a period of time". While the

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phrase has never been precisely defined, previous decisions provide some guidance. The decisions in State of Alaska v. Alexander Creek, Inc., ANCAB VE 74-31, VE 74-35, VE 74-54, VE 74-61 (Oct. 23, 1974) at 35, and Bureau of Sport Fisheries & Wildlife v. Village of Uyak, ANCAB VE 74-11 (June 9, 1974), ALJ's Recommended Decision, at 18-19, indicate that a visit of a couple of days or two one-day visits to a purported village does not qualify as having lived there for a period of time.

In the 1970's, the BIA Area Office in Juneau interpreted the regulation using an informal guideline of one month (Ex. S-6k, pp. 21-29). If a person spent less than a month in the purported village in 1970, then the Area Office considered the qualifications of that person to be "pretty touchy" and it would look to find additional people who would qualify in order to certify a village as eligible (id.). The BIA guideline was not used as a hard and fast rule (id.) and it is not controlling for purposes of this decision.

b.

### **Guidelines and principles for determining permanent residency**

Resolution of the issue of whether the alleged Village had 25 or more Native residents as of April 1, 1970, and the subsidiary issue of whether

## APPENDIX E-53

Protestant established substantial doubt as to the validity of the presumption of residency afforded enrollees of the alleged Village, depends, in part, upon the meaning of the terms "resident" or "residence". The review of the residency of individuals for purposes of determining village eligibility is subject to guidelines reiterated many times by ANCAB as follows:

For determinations of village eligibility, the Board adopts the same definition of residence used by the Enrollment Coordinator, contained in 25 CFR 43h.1(k):

"Permanent residence" means the place of domicile on April 1, 1970, which is the location of the permanent place of abode intended by the applicant to be his actual home. It is the center of the Native family life of the applicant to which he has the intent to return when absent from the place. A region or village may be the permanent residence of an applicant on April 1, 1970, even though he was not

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actually living there on that date, if he has continued to intend that place to be his home.

It is helpful to compare this definition of permanent residence with the concept of "home," defined in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 12, (1971) as "the place where a person dwells and which is the center of his domestic, social, and civil life." The comments indicated that when determining whether a place is a person's home, consideration should be given to its physical characteristics, the time one spends there, the things one does there, his intention when absent to return to that place, other dwelling places of the person and similar factors concerning those other dwelling places. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 12, Comment C at 50 (1971).

Other factors in the definition in 25 CFR 43h.1(k) recognize the special situation of Alaska Natives, where Native family life may be characterized by patterns of kinship and activities substantially different from non-Native family life. In addition, the definition recognizes the frequently transient life style of Alaska Natives. Thus, the definition emphasizes the factors of Native family life and intent to return.

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While intent is obviously subjective and personal, it is frequently capable of objective proof, and where objective evidence is presented which contradicts subjective intent, and the objective evidence is neither rebutted nor explained, it will clearly be persuasive. On the other hand, where economic, educational, or other requirements have temporarily deprived one of any real choice, and both the subjective intent and the objective evidence indicate a genuine connection with the place of enrollment, that place is considered to be the permanent residence of the individual within the meaning of 25 CFR 43h.1(k), notwithstanding that for other purposes a court or an administrative agency may find that person's residence or domicile to be some place other than his "permanent residence" as determined for purposes of the Alaska Native Claims Settlement Act.

The Respondents have cited a letter from Curt Berklund, Deputy Assistant Secretary of the Interior, dated February 27, 1973, to Morris Thompson, Area Director, Bureau of Indian Affairs, Juneau, Alaska, which interprets the definition of "permanent residence" in 25 CFR 43h.1(k). The pertinent paragraph in the letter reads:

The primary point of confusion is who now living out-of-state enrolls back to Alaska. Under the above definition a person who has at one time lived in a

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village or other place in Alaska and considered that place to be his permanent residence on April 1, 1970, and intends to return to that place must enter that place in column 16 on the application form and be enrolled there. If he considered some place outside of Alaska as his permanent residence on April 1, 1970, and intends to return there, he must enter that place in column 16. There is no "choice" involved. Under no circumstances may an individual who has never lived in Alaska enroll to a village in Alaska through personal choice by entering a village name in column 16 on the application form. The only way in which a person who has never lived in Alaska may be enrolled in Alaska would be by (1) showing an out-of-state permanent residence in column 16 of the application form and (2) voting "No" on the establishment of a 13<sup>th</sup> regional corporation. He would then be enrolled by the Secretary in one of the twelve regions in Alaska based upon the priorities listed in Section 5(c) of the Act. (emphasis in original)

Considered in the context of the enrollment regulations in 25 CFR 43h, and with particular

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reference to the problem addressed by this letter -- that is, the enrollment of persons who are residents outside the state of Alaska -- the letter is not inconsistent with the interpretation of "permanent residence" adopted by the board; but neither is it particularly relevant to the problem of how the place of "permanent residence" should be determined. There is no disagreement with the proposition that one should be enrolled to his "permanent residence."

Natives of Afognak, Inc., supra, at 12-14.

According to Protestant, the focus of inquiry under these guidelines should be on the individual's place of domicile. He argues that an individual may qualify as an alleged Village resident only if he either: (a) actually resided in the alleged Village on April 1, 1970; or (b) had previously lived in the alleged Village and (1) had continued to regard the alleged Village as his home on April 1, 1970, and (2) had a present intent on April 1, 1970, to return to the alleged Village to live.

Respondents counter that the traditional legal definition of residence or domicile is not applicable but, rather, that, in light of the Natives' patterns of kinship and activities, the emphasis should be on two factors: (1) the individual's ties to the place which is considered home and (2) the intent to return to that place. Leisnoi goes so far as

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to argue that these two factors are the only criteria.

In support thereof, it quotes the Recommended Decision of Administrative Law Judge Painter in the Natives of Afognak, Inc. case as follows: "In other words as long as a Native has some ties with the village and intends to return there, then he may be enrolled to that village as a permanent resident, irrespective of the fact that the Native may actually be living elsewhere." Supra, ALJ's Recommended Decision, at 5. However, ANCAB did not adopt this conclusion of Judge Painter, but, rather, provided its own analysis as to why the village of Afognak met the eligibility requirements.

As ANCAB repeatedly recognized, there are many factors which bear upon the determination of permanent residency and they include those listed under the definition of "home" found in the Restatement of Conflict of Laws. See, e.g., U.S. Forest Service v. Village of Kasaan, ANCAB VE 74-17, VE 74-18 (June 10, 1974) at 23-24. Those factors include the important factor of "intent to return", upon which Respondents focus much attention; but they also include the physical characteristics of the place, the time spent there, the activities engaged in there, and similar factors regarding other dwelling places. Id.

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The definition of "permanent residence" is closely linked to the definition of "home" set forth in the Restatement. The former definition twice speaks of the place which the individual intends to be his or her home. Both definitions define that place in terms of two elements: (1) where the person dwells or abides and (2) where the center of family life is located.

ANCAB has explained that the adopted definition of "permanent residence" in 25 C.F.R. § 43h.1(k) "speaks in terms of domicile, modified to fit the circumstances of Alaska Natives." Dept. of Natural Resources, State of Alaska v. Village of Manley Hot Springs, ANCAB VE 74-6, VE 74-15, VE 74-16 (June 10, 1974) at 27. The regulation, as originally proposed, consisted of only the first sentence which refers to the "place of domicile \* \*\*, which is the location of the permanent place of abode intended by the applicant to be his actual home." (Ex. BIA-1A, pp. 205-04). 37 Fed. Reg. 2679 (Feb. 4, 1972). Senator Ted Stevens commented that the proposed definition was too narrow, and should be amended to include a reference to the mental attitude of the Native (Ex. BIA-1A, p. 208). Assistant Secretary of the Interior Harrison Loesch responded to Senator's Stevens comment by noting that the Department defined residence in terms of domicile, but that the subjective intent of the applicant with respect to his actual home should be

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given as much weight as possible because the United States had only minimal interest in the place of enrollment of individual applicants and because the Department recognized the necessity of many Natives to move around (*id.*, pp. 205-03). The second and third sentences were subsequently added as clarification and explanation (*id.*). They refer to an "intent to return" to "the center of the Native family life" and to the fact that a Native could be absent from the place on April 1, 1970, if he "continued to intend that place to be his home." They were derived from the definition and guidelines for determining a person's domicile and "home" set forth in the Restatement of the Conflict of Laws (*id.*; Ex. S-33, p. 1).

The intent to return is emphasized to account for the special situation of Alaska Natives, including any transient life-style or deprivation of choice as to residency stemming from economic, educational, or other requirements. See Village of Kasaan, supra, at 24; Natives of Afognak, Inc., supra, at 13. The influences of Caucasians and a cash economy on traditional Native subsistence life-styles cannot be ignored. See Village of Eyak, supra, at 32. Those influences may create educational or economic needs which can be satisfied only by long absences from an alleged village, but such absences may not destroy strong Native feelings that the village is home. See *id.*; Village of Kasaan, supra, at 24; State of Alaska v.

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Village of Council, ANCAB VE 74-47, VE 74-41, VE 74-69 (Sept. 11, 1974) at 25.

On the other hand, erosion of Native cultural patterns and the gradual adoption of non-Native customs, technology, and the like, including long-term residency in another place, may be evidence of abandonment of the alleged village and life-style associated with "home". Fond memories of a place are not enough to establish permanent residency there; the individual must have a continuing intent to return. State of Alaska v. Point Possession, Inc., ANCAB VE 74-55, VE 74-59, VE 74-78, VE 74-84, VE 74-86 ( ), ALJ's Recommended Decision, at 27.

ANCAB repeatedly emphasized the frequency and continuity of an individual's visits to an alleged village as objective evidence of that intent. See, e.g., id., at 26-27; Village of Kasaan, supra, at 24. The terms used in the definitions of "permanent residence" and "home" - "dwell", "domicile", "residence", and "home" - all contemplate an element of regularity, continuity, or longevity in the periods of occupancy of a place. Indeed, it would be difficult to conclude that a village was the center of a Native's family life or that the Native had a continuing intent to return there when the Native has never visited there or has visited only infrequently or sporadically. See Point Possession, Inc., supra, ALJ's Recommended Decision, at 18, 27.

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Other objective, probative evidence includes evidence relating to where individuals own property or dwellings, register to vote, pay property taxes, are employed, and are registered for purposes of automobile driver's licenses, and the data in Columns 16 and 18 through 21 of the Alaska Native Enrollment Application Form for each individual, which data is compiled in the village's Family List. Natives of Afognak, Inc., supra, at 23; Village of Manley Hot Springs, supra, at 22-24; Point Possession, Inc., supra, ALJ's Recommended Decision, at 18-25; but see Village of Kasaan, supra, at 23 (such evidence of occupancy elsewhere is not necessarily inconsistent with being a permanent resident of the village); U.S. Forest Service v. Village of Chenega, ANCAB VE 74-90, VE 74-74, VE 74-80 (Sept. 10, 1974), ALJ's Recommended Decision, at 9 (utility bills, rent receipts, and driver's license evidencing occupancy elsewhere is of no probative value where village is unoccupied due to an act of God). The weight attributed to this evidence depends upon, among other things, whether the alleged village is temporarily unoccupied because of an act of God or governmental authority. See id. If such circumstances exist, evidence of unoccupancy of the alleged village or occupancy elsewhere may not necessarily be inconsistent with permanent residency in the alleged village. See id.; Kasaan, supra, at 23.

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While occupancy, or unoccupancy, of a place is normally a significant objective indication of residency there, unoccupancy cannot legitimately be used to prove that 25 or more Natives were not residents of a village on April 1, 1970, when application of the "act of God" proviso excuses the requirement of occupancy in 1970. Natives of Afognak, Inc., supra, at 23. If the "act of God" proviso excuses the occupancy requirement, it is very difficult for the Protestant to prove that there were not 25 Native residents. Id. However, as discussed in Subpart III, D, 3 below, the proviso does not apply in this case.

Several final observations related to the determination of permanent residency must be made. First, the residence of minor Native children (under age 18 on April 1, 1970) should be determined according to the residence of their Native parents, in the absence of evidence of emancipation or guardianship by some other person. Village of Manley Hot Springs, supra, at 27. Further, the attainment of majority by a child does not ipso facto separate the child from the parent's residence; the child merely acquires the power to possess a separate residence if the child desires. Alexander Creek, Inc., supra, at 32-33, 37. Thus, the permanent residence of an unmarried child who remains living with his or her parents after attaining majority, without evidence of a bona fide intention to acquire a separate residence, is

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determined according to the permanent residence of the parents. Id. Finally, for each minor who has been adopted or placed in the care of others to be raised, the minor's permanent residence should be determined according to the residence of the minor's adoptive parents or person who stands in loco parentis to the minor and with whom the minor lives. See RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 22 cmts g and i.

Second, the emphasis on intent to return to the alleged Village implies that the individual has been there at least once before. See Point Possession, Inc., supra, ALJ's Recommended Decision, at 18, 23. Third, a Native who is not enrolled to the alleged Village may nevertheless be considered a permanent resident thereof if he or she satisfies the criteria. Koniag, Inc., 405 F.Supp. at 1373-74.

c.

### **Did Protestant raise a substantial doubt about the validity of the presumption of residency?**

Applying the foregoing guidelines and principles to the evidence presented by Protestant, that evidence is clearly sufficient to raise a substantial doubt about the validity of the presumption of residency attributed to the 285

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Natives listed on the certified Native Roll for the alleged Village. Such evidence consists of a variety of types.

Citing various ANCAB holdings, Respondents argue that each of several types of evidence cannot individually establish a substantial doubt. Their arguments are inapposite because it is the totality of the evidence presented by Protestant in his case-in-chief, rather than any one piece thereof, which establishes the substantial doubt.

Each of the following types of evidence contributed to the establishment of substantial doubt. First, no adequate investigation of the permanent residency of the Natives enrolled to the alleged Village had been made by the Department prior to the hearing in this matter.

Marie Redick Unger, one of the "enumerators" who worked under contract with the BIA to assist Natives in completing the enrollment applications, testified that the enumerators were instructed to accept the Natives' representations on the applications without challenging or investigating them (Ex. S-6L, pp. 6-7). The Enrollment Coordinator similarly testified that, in general, the enrollment of each Native to the alleged Village was not based on any investigation into the Native's permanent residency, but was based solely on the Native's own application

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statement of the place of permanent residency (Ex. S-6G, pp. 29-30, 34-35).

The resulting Native Roll was then cited by the Area Director to support his finding that the alleged Village had 25 or more residents as of April 1, 1970. He also referenced Mr. Fitzpatrick's similar finding, but that finding is not grounded upon an adequate investigation.

Mr. Fitzpatrick's report provides in pertinent part:

Woody Island village is listed in the 1970 census with a population of 41. \*

\* \*

\* \* \* \* \*

On my recent visit to Woody Island village site, I observed several Native dwellings, fish racks, smoke houses, and a storage shed. I interviewed residents of Woody Island village, and determined that the village does exist and that more than 13 Natives actually used the village before April 1970, on a seasonal and year-round basis.

(Ex. BIA-2B, p. 162). The 22 enrollees who submitted affidavits in support of the alleged

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Village's application are listed as persons who so used the alleged Village (id., p. 161).

Mr. Fitzpatrick also noted that the majority of residents were Native and that the number of non-Native residents as of April 1, 1970, was 40 (id., p. 161). He indicated that the alleged Village was in existence, as evidenced by attached photographs and "residences, storage buildings, schoolhouse, powerhouse, cold storage, fuel tank farm, water plant, garage, office bldg., community center (library), Camp Woody, dock facilities, and marina." (Id.). He concluded that the alleged Village had met all the eligibility requirements, including the 25-resident requirement (id., p. 162).

His 1978 deposition testimony (Ex. S-6M) shows the following:

(1) that his on-site field examination of Woody Island lasted only 3 or 4 hours (pp. 17, 100-02, 119);

(2) that, based upon the documentation that had been submitted in support of the alleged Village's application, he assumed that the alleged Village was eligible prior to his field examination (pp. 28-29);

(3) that his field examination focused primarily on the FAA complex and its facilities (pp.

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30-31);

(4) that nearly all of the structures listed in the Village Check List as evidencing the village's physical location were the FAA's facilities (pp. 66-67);

(5) that the facilities and dwellings in the attached photographs were the FAA's facilities (pp. 60-61);

(6) that he regarded the FAA facilities and dwellings as relevant to the alleged Village's eligibility because the alleged Village was expecting to obtain use of them under a use permit (pp. 30-31, 61-65);

(7) that the statement in his report that he observed "several Native dwellings" was based upon only 1 house - Nick Pavloff's - determined to be occupied by a Native, another standing house which he saw from a distance, and the debris of several uninhabitable houses whose origins were unknown (pp. 31-33, 37-39, 52-53, 120-21);

(8) that if he had excluded the FAA facilities and dwellings, he would have reported that the alleged Village was not in existence (p. 121);

(9) that his interviews were limited to 10 to 15 enrollees of the alleged Village, each of whom

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stated that they camped at or otherwise used Woody Island in 1970, and that he could only identify 5 of them (pp. 54-59, 109-10, 119-20);

(10) that he interviewed only 4 of the 22 enrollees who submitted affidavits in support of the alleged Village's application and that he did not question any of them specifically about the content of their affidavits because, among other reasons, he had not seen the affidavits at the time of the interviews (pp. 71-72, 77-79, 109-10);

(11) that he only saw one Native, Nick Pavloff, on the island during his field examination (pp. 31-33, 37-39);

(12) that, consistent with his visual observations, the 1970 census figures provided to him by the BIA showed that only 1 of the 41 residents of the alleged Village was Native (pp. 67-70, 104-06); and

(13) that, in light of the census figures, it is unclear how he concluded that a majority of the residents were Native, but he apparently relied heavily upon the number of enrollees in concluding that the alleged Village met the residency requirements (see, e.g., pp. 34-37, 67-72).

In other cases where Mr. Fitzpatrick prepared similar eligibility reports for other villages

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under similar circumstances, the tribunals have found his investigations cursory and his reports misleading and of little probative value. See Alaska Conservation Society v. Village of Ayakulik, ANCAB VE 74-95, VE 74-104, VE 74-108 (Sept. 26, 1974), ALJ's Recommended Decision, at 10; U.S. Forest Service v. Anton Larsen, Inc., ANCAB VE 74-20, VE 74-21, VE 74-36, VE 74-57, VE 74-62, VE 74-112 (October 3, 1974), ALJ's Recommended Decision, at 16; Village of Litnik, supra, ALJ's Recommended Decision, at 33-34; Natives of Afognak, Inc., supra, at 17-18; Alexander Creek, Inc., supra, ALJ's Recommended Decision, at 32. Likewise, in the instant case, his investigation was cursory and his report is misleading and of little probative value.

Second, based upon the testimony presented by Protestant, if Mr. Fitzpatrick had interviewed the 22 affiants and non-enrollee residents of Woody Island or Kodiak, he would have discovered that many of the statements contained in the affidavits are misleading or false, that nearly all of the Natives enrolled to Woody Island were not residents in 1970, and that, as of April 1, 1970, the island lacked a Native village, contained only a few habitable non-FAA houses, and had far fewer than 25 Native residents. That testimony came from more than a dozen witnesses, including long-time Woody Island residents, Yule and Darrel Chaffin, and several Native residents of Kodiak (see, e.g.,,

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Exs. S-6A through S-6F, S-6I, S-6L, S-6N, S-6O; Tr. 93-106, 240-284, 291-325, 401-23, 451-573, 627-36, 643-676).

For example, the form affidavits of Woody Island enrollees Karl Armstrong, Christina Hoen, and her daughters, Chrislyn Hoen and Cien Marie Hoen, all indicate that Woody Island was their "usual place of residence as of April, 1970." They further state that Karl, Christina, Chrislyn, and Cien have lived there since 1963, 1948, 1969, and 1963, respectively. In fact, according to Christina Hoen's own testimony, the Hoen's, since 1956, merely lived there for weeks each summer, but resided in Kodiak for the vast majority of time each year, except 1964 (Ex. S-6F, pp. 15-27). Mr. Armstrong never lived or stayed overnight on Woody Island, according to the Chaffins (Exs. S-6A, p. 33; S-6B, p. 17).<sup>2</sup>

Similarly, the 15 identical form affidavits of Mary Chya and her family and Marie Redick and her family were shown to be false and misleading by the evidence adduced by Protestant. Each of those affidavits states the affiant lived on Woody

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<sup>2</sup>Mr. Armstrong's 1978 Deposition was admitted by stipulation. His own testimony shows that Woody Island was not his usual place of residence as of April 1, 1970, and that he did not live there since 1963. Rather, he lived in Kodiak, did not visit Woody Island from 1963 to 1967, and spent approximately 35 days there in 1970.

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Island for periods of time each year where "my residence consists of a 5 room house \* \* \*." (Ex. BIA-2A, pp. 101-87, 84-82). Contrary to the content thereof, Mary Chya admitted that neither she nor her family had a house on Woody Island or lived there for periods of time each year (Ex. S-6N, pp. 13-26). In fact, they lived in Kodiak and stayed overnight on Woody Island only two or three times over the many years they visited there (id., pp. 31-32). Marie Redick likewise admitted that she and her family lived in Kodiak and did not have a house on Woody Island, but she did allege that they stayed overnight on Woody Island every summer for periods lasting up to a week or two (Ex. S-6L, pp. 13-17, 23-24).

By itself, the testimony from persons living on or frequenting Woody Island and Kodiak Island creates substantial doubt. That testimony presented by Protestant consists of the following:

### Yule Chaffin, Darrell Chaffin, and Patricia Hampton

Yule and Darrell Chaffin were a married couple that lived on Woody Island full-time from 1945 until 1967, when they acquired a retirement home in California. Patricia is their daughter who lived with them from her birth in 1948 until she graduated from high school in 1966.

## APPENDIX E-73

From 1967 onward, with the exception of 1970, Yule and Darrell lived on Woody Island each year from mid-August to early May and in California during the rest of the year. In 1970, they lived on the island the whole year, except for the period of March 2<sup>nd</sup> through May 7<sup>th</sup>, when they were vacationing in Hawaii.

From 1967 onward Patricia lived on Woody Island each summer for approximately 3 to 4 months. In 1970 she was there for the months of July, August, and, possibly, September. Each year from 1969 through 1971 she also visited her parents on the island at Christmas time.

Because Darrell worked at the FAA facility on Woody Island, eventually becoming the Station Manager, he and his family lived in FAA housing until 1967, when Darrel retired and he and Yule moved into a cabin they had built above Una Lake on the west side of the island. They also had a large garden near Camp Woody on the west side.

They could not see the dock from their cabin, but Darrell frequented the area near the dock to tend their garden and crab pots which he stored for crabbers for a fee. He also made daily trips to the dock while working for the FAA. He testified by deposition that he knew and had regular contact with all the Native residents of Woody Island.

## APPENDIX E-74

Yule has researched and authored numerous books and articles regarding the history of Woody Island and the Kodiak region. Her research included interviewing Ella Chabitnoy, who was a good friend whose family regularly interacted with the Chaffins. The Chaffins were also good friends with the Simeonoffs. Beginning in the 1950's, Yule made daily entries in a diary detailing the activities on the island and the persons living there. Both Yule and Patricia testified by deposition that they regularly hiked all around the island and knew everyone who lived on Woody Island while they were living there.

Patricia testified that there was no Native village, store, or church on Woody Island, that none of the Native homes were habitable in 1970, that she did not see Natives camping on Woody Island with any frequency in 1970, and that when she left in 1966, there were only three Native residents: Johnny Maliknak, Nick Pavloff, and Wilfred Pavloff. Consistent therewith, Yule testified that Johnny and Nick were the only residents left by 1967, as Wilfred drowned that year, and Darrell stated that there was only one habitable house in 1970.

For the year 1970, Yule, Darrell, and Patricia each identified only two Native residents of Woody Island: Johnny Maliknak and Nick Pavloff, exclusive of any FAA families. The parties

## APPENDIX E-75

stipulated that if Yule were called to testify, she would testify that none of the enrollees to Woody Island, except Johnny and Nick, were residents of Woody Island in 1970. (Exs. S-6A, S-6B, S-6C, S-6O; Tr. 148-149, 168-69, 171-72, 192-93, 220, 225, 233-36, 1925-27)

### Richard Hensel

He was on Woody Island almost daily during November and December of 1957, January of 1958, and the summer months of 1958 and 1959, conducting a study of snowshoe hares. He traveled most of the forested areas, but not the beach areas, on foot. During the 1960's, he flew over Woody Island regularly each year from the end of March through November. He visited many Native villages in the Kodiak archipelago and testified that there was no Native village on Woody Island. According to Mr. Hensel, Woody Island lacked a store, church, village council, and other typical indices of a village. The reliability of his observations are called into question by the fact that he observed only two Natives and one Native house, despite the fact that Protestant's own evidence shows that there were many Native residents and homes at the end of the 1950's. (Tr. 93-95, 100-01, 103-06, 114-18, 122-23, 125-32).

## APPENDIX E-76

### James Harold Naughton

From 1935 to 1996 he lived in Kodiak. He is of Native descent and served as the Kodiak postmaster from 1973 to 1977. Several times each year he visited his sister who lived in FAA housing on Woody Island until 1969.

He has visited the Native villages of Old Harbor and Ouzinkie and opined that there was no Native village on Woody island from 1960 through 1970. He identified a couple dozen of the Woody Island enrollees to be residents of Kodiak in 1970 and stated that he never saw them on Woody Island. (Tr. 240-54, 261-63, 284)

### Edward Naughton

He is a Native who was President of KANA from 1970 to 1973. With the exception of several years in the military and in college during the 1950's, he has lived in Kodiak since 1935. In 1970, he visited Woody Island for only 2 or 3 days and thus would not have been aware of visitors to the island that year.

He too identified a couple dozen of the Woody Island enrollees to be residents of Kodiak, and not Woody Island, in 1970. He interpreted a person's residence to be where he or she spent the majority of their time and where he or she had a home.

## APPENDIX E-77

He spoke to several Leisnoi shareholders, including Thelma Johnson, who stated that they did not know why they were Leisnoi shareholders. He opined that there was no village on Woody Island and that Leisnoi fabricated Woody Island as a "bogus" village to obtain more benefits under ANCSA. (Tr. 291-94, 300, 305-13, 318-19, 323-25, 333).

### William Cordry

He began working for the FAA and living on Woody Island in 1968. He hiked around the entire island. In 1969 he took over as the FAA operator of the FEDAIR IV. At the end of 1969, his wife, five children, and himself moved to Kodiak, but he continued to work for the FAA on Woody Island, commuting daily by FEDAIR IV from the dock.

He did not remember seeing any Native dwellings on Woody Island and opined that there was not a Native village there. No Native children attended the school there when it closed in 1969. He too observed that numerous Woody Island enrollees were not residents of the island in 1970, but, rather, that most were residents of Kodiak.

He did not see any Natives picnicking or fishing on Woody Island nor any regular Native activity of any kind. However, he would not necessarily have been aware of island visitors who

## APPENDIX E-78

came there on their own boats. (Tr. 401-02, 405, 411, 414-23, 431, 435, 438).

### Zelma Stone

Her husband was employed from 1946 until September 1970 by the American Home Baptist Mission Society as administrator of the Kodiak Baptist Mission and, in that capacity, was required to check regularly on the Mission's holdings on Woody Island, including a herd of cattle started in the late 1960's. They lived on Kodiak Island during that time, but Zelma regularly visited Woody Island with her husband, including staying a week or two at a time each summer during the 1960's while she worked at Camp Woody. They were good friends with Ella and Mike Chabitnoy.

She has visited the villages of Larsen Bay, Karluk, and Ouzinkie, and she testified that there was no village on Woody Island from 1946 to 1970. She elaborated that Woody Island lacked employment opportunities, a Native association or tribal government, and a church. She was not aware of any regular meetings or congregation of people on the west side. She was not aware of anyone living in the Harmon house on Site 17 from 1960 through 1970, in the Fadaoff/Madsen home on Site 23 during the last half of the 1960's, or in the Chabitnoy house in 1970. She believed that only 8 to 10 Natives were living on Woody Island at the

## APPENDIX E-79

time of the 1964 earthquake and that Johnny Maliknak and Nick Pavloff were the only persons living on the west side in 1970.

With regard to numerous Woody Island enrollees she stated that she had never seen them on Woody Island, that they never lived on Woody Island, that they were not living there in 1970, and/or that many were residents of Kodiak. (Tr. 451-59, 462-67, 480-86, 494, 498, 507, 509, 518-19, 524-26, 566-67; Ex. S-36)

### Terry Olivia Johnson

From her birth in 1955 to 1971, she lived with her family in FAA housing on Woody Island. She does not remember any non-FAA children attending the Woody Island grade school during the early 1960's. In approximately 1966 she began commuting daily to Kodiak via FEDAIR IV to go to school. She opined that there was no Native village on the west side.

She explained that while she hiked or motorbiked all over the island in the summer, ran through vacant Native houses on the west side, and took the FEDAIR IV to school everyday, she saw only Johnny Maliknak, Nick Pavloff, and a couple of other Natives and rarely saw anyone living in the Native homes. She does not remember any Natives visiting, berrypicking, or camping there nor any

## APPENDIX E-80

skiffs tied up there, except those of Johnny, Nick, and the Chaffins. She identified several Woody Island enrollees as being residents of Kodiak.

She and her family were the 6 Negroes listed on the 1970 census for Woody Island. (Tr. 627-39, 2026)

### James Payne

He lived in Kodiak from April 1, 1970 to 1978. He came there to work on Woody Island as an FAA electronics technician. He began working during the first or second week of April. He commuted five days a week to Woody Island via FEDAIR IV. The Natives he observed riding FEDAIR IV were limited to Johnny Maliknak, Nick Pavloff, and Nick's unidentified girlfriend.

He did not see any boats pulled up on the beach or tied up off shore, nor did he see any Natives camping, hunting, fishing, or berrypicking. He opined that there was no Native village on Woody Island. (Tr. 643-46, 648-49, 654, 664-66, 669, 672)

### Waldeman Johnson

He lived and worked on Woody Island as the FAA's Station Administrator from November 1959 to 1971 and opined that he knew everyone that

## APPENDIX E-81

lived there. He too identified Johnny Maliknak and Nick Pavloff as the only Natives living or consistently returning to Woody Island in 1970. Of the persons submitting affidavits in support of Woody Island's application, only Johnny, Nick, and Christina Hoen ever lived on Woody Island, according to Mr. Johnson. (Ex. S-6D)

### Tim Smith

He was born in 1953 and lived in Ouzinkie from 1956 to 1977. Each summer during that period he lived at Camp Woody on Woody Island from the first or second week in June to mid-August, as his parents were involved in the creation and operation of Camp Woody. In 1970, he filmed various locations and activities on the island and a copy of that film was admitted into evidence (Ex. S-41).

He testified that in 1970 the Chabitnoy and Fadaoff/Madsen houses were habitable but uninhabited, the condition of the Simeonoff house was poorer than that of the Chabitnoy house, the Harmon house was not standing, and no structures existed in the area of Sawmill Point. He remembered the Harmon house being abandoned and uninhabitable by the late 1950's. He identified another structure in the Garden Beach area as having a bad roof, no windows, and an open door in the early to mid-1960's. According to Mr. Smith, an

## APPENDIX E-82

open door is usually a sign of abandonment in Alaska, where wood structures deteriorate rapidly from exposure to the elements.

The only Natives he saw on a regular basis on Woody Island were Nick Pavloff, Johnny Maliknak, and Rudy Sundberg Jr. He acknowledged that he might not have noticed a small group camping and did observe other persons from time to time picking berries and using the beaches. He further observed that there were always people fishing in skiffs offshore. However, he did not know most of the Natives purported to be permanent residents of Woody Island in the Feichtinger Report.

He stated that Nick and Johnny were the only consistent non-FAA residents and that they lived in the North Village area. The population of the South Village area was not consistent, with changing occupants and few or no occupants for many years.

Mr. Smith, having regularly traveled to other Native villages with his parents to evangelize and teach vacation bible school, opined that Woody Island was not like the other villages. They were able to identify and establish relationships with the residents of each house in the other villages because the houses were consistently occupied for long periods of time by the same people. They could not do so on Woody Island because there was no

## APPENDIX E-83

consistent population other than Nick and Johnny. (Tr. 1928-29, 1931-32, 1944-46, 1949-50, 1957-61, 1980-83, 1986, 1993-96, 1998-2000, 2003, 2009-14)

### Shirley Berns

She lived in Kodiak from May 1964 to 1976 and again from 1985 onward. As a 1970 census worker for the Government, she canvassed Woody Island in May 1970. While she listed eight persons as being "Native", the category "Native" included anyone who was not "White" or "Negro". She remembered encountering only one person who actually identified himself as being Native: Nick Pavloff.

On the west side she observed a total of five houses, including ~~only~~ one inhabited house which was occupied by Nick Pavloff, the Chabitnoy house which was habitable, and three other houses which were uninhabitable. She identified numerous Woody Island enrollees to be residents of Kodiak in 1970. (Tr. 2024, 2028-30, 2032-34, 2040, 2046, 2049, 2058-61)

### Bill Torsen

He operated FEDAIR IV from September 1962 to June 1966, while living in Ouzinkie. He testified that the FAA established a policy in 1963 that only FAA personnel, their families, and invited

## APPENDIX E-84

guests could ride on the FEDAIR IV. However, throughout Mr. Torsen's tenure, non-FAA persons were allowed to ride FEDAIR IV if they were residents of Woody Island or if they obtained permission from the FAA station manager.

Mr. Torsen moved to Kodiak in 1969 and lived there until 1980, when he moved to the State of Washington. Thereafter, he has resided in Kodiak each summer. He is of Native descent and is generally familiar with the Natives living in and around Kodiak.

He testified that Johnny Maliknak and Nick Pavloff were the only Natives living on Woody Island in 1970. However, he seldom disembarked from FEDAIR IV on Woody Island and never visited any of the Native homes, so he would not have known how many adults or children were living in those houses.

He identified numerous Woody Island enrollees as persons who resided in Kodiak in 1970, who resided in Kodiak from 1962 to 1966, whom he never saw on Woody Island, and/or whom he never saw on FEDAIR IV. He indicated that Woody Island had no stores, post office, or supplier of fuel in 1970. (Tr. 2062, 2064-2073, 2075-78, 2084, 2086)

## APPENDIX E-85

### Gary Ennen

He lived on Woody Island in FAA housing from 1965 to 1967 and commuted daily to Kodiak to attend high school. He hiked all over the island and did not observe any regular Native activity or Native village on Woody Island. He did not see anyone in the South Village area, but he did not pay much attention to that area. He did see weekend visitors to the island occasionally. (Tr. 2087-92, 2101, 2104).

### Cyril Hoen

He is a non-Native who married Christina Simeonoff in approximately 1962. They are now divorced. His wife's extended family loves Woody Island.

Cy, Christina, and their children lived in Kodiak in the 1960's and 1970, except for approximately eight months in 1964 when they lived on Woody Island in the Simeonoff house. They moved to Woody Island after the 1964 earthquake and tidal waves because Kodiak was a "mess".

When they lived on Woody Island, he worked in Kodiak for Sutliffs or Kodiak Commercial and commuted daily to work in a small boat. It was difficult to commute in the winter and easier to live

## APPENDIX E-86

in Kodiak, so they moved back.

In late 1969 he opened a sporting goods store in Kodiak. Christina worked at times in a cannery and in the store.

During the 1960's and 1970 they visited Woody Island ten to twelve weekends per year and on "good" days for recreation, berrypicking, and rabbit hunting. They stayed in the Simeonoff house and did not stay for longer than a weekend.

When they lived on Woody Island after the earthquake, their only relative who may still have been living on Woody Island was James Fadaoff. On Woody Island he also saw Edson Fadaoff sometimes, Rudy Sundberg Jr. quite often, and Maurice Harmon in 1970. (Tr. 2108-11, 2112-18, 2122-23, 2127, 2130, 2134-35, 2137)

### James Sandin

His testimony is inconsequential.

### Lloyd Devoe Friend

He has lived in Kodiak since February 1966. From 1968 onward, he has made 2 or 3 rabbit hunting trips per year to Woody Island in October/November and January/February. He never saw any Natives in the South Village and did

## APPENDIX E-87

not notice any houses there other than the Fadaoff/Madsen house. He did see other rabbit hunters and a lot of people fishing in boats off the west shore of Woody Island. (Tr. 2384-86, 2390, 2392-95)

### Lenhart Goethe

He has lived in Kodiak since 1963. He lived on Woody Island in a trailer by the dock for approximately six months immediately prior to the 1964 earthquake while he cleared an area for installation of the FAA's VORTAC facilities. He returned in June 1964 to complete the project, staying 10 days at Camp Woody.

He was assisted by Nick Pavloff, John Ponchene, James Fadaoff, and Wilfred Pavloff. He testified that Nick's family was the only non-FAA Native family living on the island at that time. Both James Fadaoff and John Ponchene commuted from Kodiak, staying overnight on Woody Island only occasionally. With the exception of Rudy Sundberg Jr., Mr. Goethe saw no other Natives using the west side of the island. The several houses in the South Village were boarded up and not used, except occasionally by James Fadaoff and John Ponchene. Mr. Goethe did not visit the North Village. He opined that there was no Native village on Woody Island. (Tr. 2397, 2399-2403, 2406, 2410-12, 2415, 2418, 2420)

## APPENDIX E-88

### Larry Dean Amox, Sr.

His testimony relates to the credibility of Karl Armstrong.

### Edward Ward

He was born in January 1953. He, his parents, and five siblings moved from the State of Washington to Kodiak in September 1965. His parents moved to Anchorage in 1977 and Edward moved to Homer in the late 1980's.

His father, Harold, his siblings, and himself are Woody Island enrollees, yet he testified that none of them ever lived on Woody Island. As of 1970, the family's home was in Kodiak, where they lived, went to school, attended church, and received their mail and where his parents were registered to vote and licensed to drive.

From 1969 to 1971 he visited Woody Island a couple of dozen times with friends to avoid chores at home, hunt rabbits, harass the cattle, and otherwise recreate. His younger sister, Kyra, also visited the island with him or her friends. Most of his visits were daytrips. His longest stay was two nights and three days.

Edward is now the CEO and President of Leisnoi. He discussed Leisnoi's attempts to

## APPENDIX E-89

repopulate Woody Island, including the expenditure of \$200,000 to upgrade the FAA structures in 1977 and its shareholder homesite program begun in 1995 or 1996. (Tr. 2454-57, 2461-68, 2476, 2490, 2496-98, 2506-29; Ex. BIA-2B, pp. 11-10)

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Third, further doubt as to the validity of the residency presumption is cast by the enrollees' responses to questions in their enrollment applications, as assembled in the Family List for the alleged Village. The Family List (Ex. BIA-2B, pp. 149-48) includes the names and entries of 264 of the 285 Natives listed in the certified Native Roll. The following is a breakdown of the responses given by those 264 persons:

- 1) 262 persons listed Woody Island as the place of their permanent residence as of April 1, 1970, while 2 listed a place other than Woody Island;
- 2) 10 persons listed Woody Island as the place where they resided for 2 or more years on April 1, 1970, while 116 listed Kodiak, 79 listed some other place, and 59 persons left the column blank or stated "at large";
- 3) 10 persons listed Woody Island as the place where they resided for an aggregate of 10 or

## APPENDIX E-90

more years, while 130 listed Kodiak, 48 listed some other place, and 75 persons left the column blank or stated "at large" (1 additional entry is illegible);

- 4) 9 persons listed Woody Island as their birthplace, while 114 listed Kodiak, 129 listed some other place, and 11 persons left the column blank (1 additional entry is illegible);
- 5) 58 persons listed Woody Island as the birthplace of an ancestor, while 91 listed Kodiak, 85 listed some other place, and 26 persons left the column blank (4 additional entries are illegible).

Of the 264 enrollees listed in the Family List, only 10 persons listed it as the place where they resided for two or more years on April 1, 1970, and only 10 listed it as the place where they resided for an aggregate of 10 or more years. In contrast, Kodiak was listed by 116 enrollees as the place where they resided for two or more years on April 1, 1970; and by 130 enrollees as the place where they resided for an aggregate of 10 years. While such objective evidence is not necessarily inconsistent with individuals being permanent residents of the Village, Village of Kasaan, supra, at 23, it does cast some doubt on the validity of the presumption of residency based on the certified Native Roll.

## APPENDIX E-91

Additional doubt is generated by the identity of the persons who listed Woody Island as the place where they resided in their responses on their enrollment applications. The ten persons who listed Woody Island as the place where they resided for 2 or more years on April 1, 1970, are:

Diane Carol Conaway (Ex. BIA-1A at 97)  
Jonna Christine Purcell (Ex. BIA-1A at 138)  
Alberta Ann Tibbetts (Ex. BIA-1A at 134)  
Vernon Byron Holland (Ex. BIA-1A at 133)  
Mary Thorsheim (Ex. BIA-1A at 90)  
John Harren Holland, Jr. (Ex. BIA-1A at 79)  
Walter Otto Kraft (Ex. BIA-1A at 74)  
Anna Nettie Blinn (Ex. BIA-1A at 73)  
Mary May Mack (Ex. BIA-1A at 73)  
Jay James Anderson (Ex. BIA-1A at 55)

The ten persons who listed Woody Island as the place where they resided for an aggregate of 10 or more years are:

Jonna Christine Purcell (Ex. BIA-1A at 138)  
Alexandra Apple (Ex. BIA-1A at 134)  
Vernon Byron Holland (Ex. BIA-1A at 133)  
George Heitman, Sr. (Ex. BIA-1A at 127)  
Elizabeth Kirzel (Ex. BIA-1A at 123)  
Angeline Melaknek (Ex. BIA-1A at 118)  
Rayna Joyce Monroe (Ex. BIA-1A at 95)  
Walter Otto Kraft (Ex. BIA-1A at 74)  
Mary May Mack (Ex. BIA-1A at 73)

## APPENDIX E-92

John Harren Holland, Jr. (Ex. BIA-1A at 79)

Of those persons in the two lists above, only Angeline Melaknek (Maliknak) and Rayna Joyce Monroe were identified by any of Protestant's witnesses as having actually lived on Woody Island.

This casts doubt on the reliability of the certified Native Roll and the Native applicants' own statements of the place of their permanent residence. Significantly, as previously mentioned, these statements generally were the only evidence upon which the Enrollment Coordinator relied in determining permanent residency for the Native Roll.

Fourth, the sheer number of enrollees, 285, in relation to the actual evidence of sparse use and occupancy of the Woody Island from 1960 through 1970 strongly suggests that the roll for Woody Island is inflated with many persons who were not permanent residents of the island.

Fifth, the validity of the presumption of residency is called into question by the 1970 census data for the entire island. The data provided to Mr. Fitzpatrick by the BIA shows only 1 of 41 residents of Woody Island in 1970 to be Native.

Census data from a publication entitled "Selected 1970 Census Data for Alaska

## APPENDIX E-93

"Communities" similarly shows Woody Island's population to be 41 (Ex. S-18). It indicates that only a few more residents - 8 - were Native (Ex. S-18). Shirley Berns, the 1970 census taker for Woody Island explained that she included in the category of "Native" anyone who was not categorized as "Negro" or "White" and that she included only 1 person in the category of "Native" who was identified as Native (Tr. 2049, 2059).

Sixth, many of the Village enrollees originally enrolled to another place and then applied to change their enrollment. ANCAB has held that such evidence can contribute to the establishment of substantial doubt as to the validity of the presumption of residency. Village of Litnik, supra, ALJ's Recommended Decision, at 35-36; see also Village of Council, supra, ALJ's Recommended Decision, at 14.

Seventh, two studies raise further doubt as to the validity of the presumption. "Alaska Natives and the Land" (Ex. S-1), dated October 1968, is a publication commissioned by Congress in anticipation of ANCSA and subsequently adopted as an appendix to the Senate Report issued by the Senate Committee on Interior and Insular Affairs for Senate Bill 35. See Senate Report No. 92-405, 92<sup>nd</sup> Congress, 1<sup>st</sup> Session, pp. 73-74. Leisnoi is shown on a map of historic Native places and is listed as "abandoned" (Ex. S-1, pp. 249-50). Leisnoi

## APPENDIX E-94

or Woody Island is not included in two other maps, one of current places with Native population in the Kodiak region and one of places having a Native population of 25 or more (*id.*, p. 251).

"Villages in Alaska and other Places Having a Native Population of 25 or More" (Ex. S-2), dated 1967, is a compilation of villages and places having 25 or more persons, half or more of whom are Natives, as well as places which are predominantly non-Native but which have a Native population of at least 25. Woody Island or Leisnoi is not listed therein.

In summary, Protestant produced ample evidence creating substantial doubt as to the validity of the presumption of residency for all of the 285 alleged Village enrollees, excepting Johnny Maliknak and Nick Pavloff. Numerous witnesses conceded that those two men were life-long residents of Woody Island. Therefore, the presumption disappears and the issue of whether the alleged Village had 25 or more residents on April 1, 1970, will be determined as if no presumption had ever been applicable for all but two of the enrollees.

## APPENDIX E-95

d.

**Did Protestant meet his burden of proving that the alleged Village did not have 25 or more Native residents as of April 1, 1970, and that less than 13 enrollees used the alleged Village during 1970 as a place where they actually lived for a period of time?**

Resolution of the issues in this case requires an examination of the evidence regarding individual's use and occupancy of the alleged Village during the crucial time period from 1960 through 1970. Respondents argue that Protestant failed to meet his burden of proof regarding the issue of whether the alleged Village had 25 or more Native residents as of April 1, 1970, because, with respect to most of the individuals who enrolled to the alleged Village, he did not present specific evidence negating each's subjective intent to return to the alleged Village.

Contrary to Respondents' assertions, such evidence is not required to meet Protestant's burden of proof. Protestant rebutted the presumption of residency for the enrollees and met his ultimate burden of proof by showing that the alleged Village was abandoned. Where the evidence shows that only a few Natives lived in the alleged Village in 1970, that there was no frequent or consistent use of the alleged Village by others, and

## APPENDIX E-96

that the abandonment was not attributable to an act of God or governmental authority within the preceding 10 years, then the need for evidence specific to individuals arises, if at all, only to overcome any such evidence presented by the Respondents.

Respondents and their anthropological experts simply placed too much emphasis upon any tie or connection a Native may have to Woody Island and any expression of desire to return or go to Woody Island. For instance, Mr. Wooley testified that an individual was placed upon Mr. Feichtinger's list of 1970 permanent residents if he or she had an ancestor who lived on Woody Island and he or she expressed an intent to return there, or if he or she expressed an interest in or tie to Woody Island, visited the island for as little as part of one day, and expressed an intent to return there (Tr. 2297-98, 2340). Someone who has never been to the alleged Village or who has only used the land there for one day or a few days over a long period of time would not be a permanent resident of the alleged Village.

Dr. Davis similarly focused upon a person's ties or connections to Woody Island, stating that any descendant of a person who lived on Woody Island had sufficient ties to be classified as a permanent resident (Tr. 3631; see also Tr. 3444, 3448-49, 3490, 3506-07). She emphasized that the

## APPENDIX E-97

Natives' society is matrilineal, in which individuals identify with the place where they were born (Tr. 3444, 3448-49). She testified that the South Village and North Village were clearly defined by kinship, with Ella Chabitnoy serving as the matriarch of the South and Angeline Maliknak being the matriarch of the North (Tr. 3458, 3479-83). She identified a third group or family to be those persons whose Native identity was tied to the Baptist Mission which once existed on Woody Island (Tr. 3483-85, 3508-09). She expressed her view that each of these three groups could have qualified separately as a village (Tr. 3633-35).

When asked whether the alleged Village qualified as a Native village in 1970, she opined:

It was a village in the sense of the continuity of identity and soul of shareholders \* \* \*. It was a village in the sense that people were going back  
\* \* \*

\* \* \* \* \*

It was a village in the sense that people chose to enroll [there]. There were people living there.

\* \* \* \* \*

## APPENDIX E-98

They have strong links and good memories.

(Tr. 3488-90).

When asked if there was a sense of community among the enrollees, she referred to the many adoptions and tragic deaths of Natives who had lived on Woody Island and stated: "It, it's amazing how much [of a sense of community was elicited during my interviews], given the fact of what had happened, a sense of community in the sense of an identity of soul on Woody." (Tr. 3506) When asked to explain what she meant by "soul", she responded that the Natives had fond memories of the island - a connection thereto (Tr. 3506-07). She continued:

There wasn't a sense of community that required a physical structure the way you and I would think about a town -- or the way that we, that the Regs. were initially read in terms of a village with a store and that sort of thing. \* \* \* I think the village of Woody Island goes beyond the boundaries of the island. \* \* \* [I]t was the connection through family, regardless of where they were, that gave them the identity of Woody Islandness. \* \* \* When I asked about their going to Woody, if

## APPENDIX E-99

they didn't go to Woody, they sure as hell wanted to.

(Tr. 3507-08). She further noted that enrollees "kept the village going" by living, working, attending church, and socializing together in Kodiak or other places such as Anchorage (Tr. 3486-88, 3495-96).

At all relevant times, the Village's location, if any, did not exceed the boundaries of the North Village, South Village, and Garden Beach areas on Woody Island. Contrary to Dr. Davis' testimony, Natives cannot keep a village going by communing elsewhere. Under ANCSA, any communing in Kodiak or elsewhere by Woody Island enrollees does not support the existence of a village at the location on Woody Island or their permanent residency at that location, but, rather, such communing supports a finding that each Native's permanent residence is the place of communion.

The problem with the approach of Respondents and their experts is that it deviates from the statutory, regulatory, and precedential guidance as to what constitutes a Native village and a permanent resident thereof. The statements or testimony of the Natives and Dr. Davis that the Natives' have fond memories or a love of Woody Island and an intent to return do not establish permanent residency. As previously noted, the permanent residency of a Native cannot be

## APPENDIX E-100

established by fond memories. Many factors come into play, including the nature and extent of a Native's activities in the various places where the Native dwells; the factors are not limited to the Native's expressed intentions or mental attitude.

Further, many of the expressions of intent to return to Woody Island did not evidence a continuing intent to return. The vast majority of potential permanent residents of Woody Island experienced an erosion of their Native cultural patterns and adopted non-Native customs, technology, and the like, including long-term residency in another place. They abandoned the alleged village and life-style associated with "home".

The weight of the evidence shows that, prior to 1970, nearly all of the potential permanent residents had become part of the modern cash economy, as Mr. Feichtinger acknowledged (Tr. 1376-78). They chose to live near employment, educational, and medical services or opportunities and intended to return to live on Woody Island, if at all, only if the island ever developed such services and opportunities or if their need for such things dissipated upon retirement or other happenstance.

In other cases where a village was found eligible under ANCSA, despite the impacts of the modern cash economy upon a traditional subsistence existence, ANCAB emphasized that the

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Natives' residency elsewhere for employment and educational purposes was temporary or seasonal and that the Natives continued to return to live in the village according to their Native family life-style on a frequent and continuous basis. See Village of Kasaan, supra, at 24; Village of Council, supra, at 25-26. For those one or two Natives who lived elsewhere for years at a time but were still found to be permanent residents of the village, ANCAB emphasized that they maintained homes in the village. Id.

Unlike those cases, this case involves an alleged village to which the Natives did not continue to return to live both on a frequent and continuous basis and according to their Native family life-style. Nearly all of them returned, if at all, only discontinuously and/or infrequently. Further, nearly all did not return to live but merely to use the island (and not necessarily the alleged Village) on day-trips or very brief overnight stays. That use was often recreational in nature. Many Woody Island enrollees acknowledged that their use of the island was primarily, if not exclusively, recreational. The island was identified as an easily accessible, park-like place to "goof around", "picnic", and the like, only minutes away from Kodiak where a large number of the enrollees lived on a long-term basis. While there was evidence of use for gardening, hunting rabbits, seals, and octopus, fishing, harvesting shellfish, and gathering edibles,

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such as berries, most of the evidence of use for traditional or subsistence purposes during the decade ending in 1970 is vague as to the amount of such use and the extent of the Natives' reliance upon such use to sustain themselves. Their day-trips or very short visits, often or exclusively for recreational purposes, was not in accordance with the traditional Native family life-style.

Nor is the evidence of home ownership or maintenance on Woody Island very supportive of the alleged permanent residency of the Natives. One of the few Natives who owned or maintained a habitable house in 1970, Ella Chabitnoy, expressed to others the previous year that she did not intend to return to Woody Island because of bad memories and the absence of loved ones. She then sold her property containing two of the habitable houses, the Chabitnoy and Simeonoff houses, to non-Natives in 1971.

With the exception of Christian Simeonoff Hoen, and possibly Kelly Simeonoff, Jr., the Simeonoffs did not use the Simeonoff house with any frequency or consistency after the early 1960's, despite often living in Kodiak in close proximity to Woody Island. Several of them enrolled to Uganik and were more involved in building and maintaining a home there. While Christina did pay the taxes on the home for some period of time, she testified that, as of 1970, it was not possible for her

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to return to Woody Island to live because of the lack of employment opportunities. Kelly Jr. testified that in 1970 he did not visit the island and it was not the center of his Native family life.

None of the ostensible owners of the third and last habitable house in the South Village in 1970, the Fadaoffs, had stayed at the house with any frequency or continuity since 1965. Further, the house was allowed to deteriorate until it was barely habitable by 1970. A few years later they sold the house to Roy Madsen.

In the North Village, the Sundberg house remained standing in 1970, but Esther Sundberg testified that she could not say if Woody Island was considered the center of the Sundberg's family life in 1970 because the Sundberg's were all living in Kodiak. A couple of the family members enrolled to the Village of Litnik, not the alleged Village. The only family member to visit Woody Island with any frequency in the late 1960's and 1970 was Rudy Jr., but his permanent residence must be determined in accordance with that of his parents who were his guardians. Further, the land where the house sat until it collapsed in 1986 is now owned by the Kodiak Island Borough. None of the Sundbergs asserted a claim to the land or otherwise attempted to acquire property on Woody Island. The only permanent residents of the North Village in 1970 were Johnny Maliknak and Nicholas Pavloff, who

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occupied various houses there over the years.

The cabin on Garden Beach used by Georgi Nekeferoff was not standing by 1970, and there is no good evidence of how often he used or maintained it. There are just vague references of his being on Woody Island or using the cabin when he was not living in the Kodiak jail.

As previously mentioned, an expressed intent to return to a place is an important factor but not the only relevant factor. Further, an expression of subjective intent may be contradicted by objective evidence, and if that objective evidence is neither rebutted nor explained, it will clearly be persuasive. Natives of Afognak, Inc., supra, at 13.

The breakdown of any significant evidence regarding individuals' use and occupancy from 1960 through 1970 is set forth below. If an individual was identified in the Feichtinger Report as being a 1960's resident and/or a 1970 resident of Woody Island, that fact is noted parenthetically following that person's name. As noted by Mr. Feichtinger, the genealogy of nearly all of these individuals can be traced to one or more of six families "whose heritage lies with Woody Island Village." (Ex. L-DOC-108, tab 3, p. 1, tab 4, p. 1) For each family, individual names are indented to reflect generational differences.

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Based upon that breakdown as well as the general evidence of use and occupancy of Woody Island, a conclusion is reached for each individual named below as to whether he or she was a permanent resident of the alleged Village on April 1, 1970. For each named individual a determination is also made as to whether he or she lived for a period of time in the alleged Village in 1970.

**THE PAVLOFF (a.k.a. PAVLOV) FAMILY:** The Pavloff family descends from William E. Pavlov, the Vice-Governor of Alaska from 1858 to 1867. His son, Nicholai W. Pavloff, first took up residency at Woody Island in 1867 (id.). Their use and occupancy is as follows:

1. Angeline Pananarioff Pestrikoff Pavlov Maliknak (dec'd: 1972; res: 1960's)

Her first husband was Larry Pestrikoff (dec'd: 1918). Her second husband was William N. Pavloff (dec'd: 1931), son of Nicholai W. Pavloff. Her third husband, Stephan Maliknak, died in a boating accident in 1958. She was the matriarch of the Pavloff, Maliknak, Frump, Ponchene, and Sundberg families and, until her death, was the owner, by inheritance, of the North Village unperfected homestead and homesites.

She resided on Woody Island for over 50 years until she moved to a nursing home in Seward,

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Alaska, because of failing health. She moved in 1965 or 1966, just prior to the time that her house on the homestead burned down. Most of her family members had moved away prior to her move to Seward. She died in Seward in 1972.

There is no evidence that she ever returned to Woody Island after moving to Seward. Nor is there testimony or other statements from Angeline as to whether she had a subjective intent to return to Woody Island on April 1, 1970. Mr. Feichtinger did not identify her as a 1970 resident of the alleged Village.

She is enrolled to Woody Island and the Family List shows that she listed Woody Island as her permanent residence on April 1, 1970, and as the place where she resided for an aggregate of 10 years or more. It also lists Seward as the place where she resided for two or more years on April 1, 1970. (Tr. 2706, 2804; Exs. S-6Q, p. 13; S-6B, p. 12; L-DOC-96, -108, -122, -346; BIA-2B, pp. 118, 24).

Angeline's permanent residence was the alleged Village until 1965 or 1966. The objective evidence indicates that her permanent residence was Seward thereafter and that she did not live in the alleged Village for a period of time in 1970.

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### 2. Herman Ponchene (dec'd: 1973; res: 1960's)

He lived with Angeline on Woody Island as her common law husband from approximately 1958 until she moved to the nursing home in Seward in 1965 or 1966. There is no evidence of his whereabouts thereafter, except that he died on Woody Island in approximately 1973 and that numerous witnesses did not observe him as one of the persons using Woody Island in the late 1960's and 1970. He did not enroll to Woody Island and no statement or testimony from him was introduced. The Feichtinger Report does not identify him as a 1970 resident. (Tr. 940, 944, 950, 1464-65; Ex. L-DOC-108).

Herman's permanent residence was the alleged Village from approximately 1958 until 1965 or 1966. His permanent residence was not the alleged Village thereafter and he did not live in the alleged Village for a period of time in 1970.

### 3. Rudolph Sundberg, Sr. (dec'd: 1984; res: 1960's, 1970)

### 4. Jenny Pestrikoff Sundberg (dec'd: 1972)

5. Esther Marie Sundberg Denato

6. Lillian Sundberg Miller

7. Janet Sundberg Grant

8. Rudolph Sundberg, Jr. (res: 1960's, 1970)

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9. Herman Sundberg (dec'd: 1992; res: 1970)
10. Anita Sundberg Hartman(dec'd: 1998; res: 1970)

Rudolph Sr. married Angeline's daughter, Jenny Pestrikoff. Rudolph Jr., Herman, Anita, Esther, Lillian, and Janet are six of their children. Jenny, Rudy Jr., Anita, Lillian, and Janet are the only family members enrolled to the alleged Village. The Feichtinger Report lists only Rudy Sr. and Rudy Jr. as 1960's residents and Rudy Sr., Rudy Jr., Herman, and Anita as 1970 residents.

The family had a home on Woody Island in the North Village (the Sundberg homesite) in which they resided until 1943, at which time they moved to Kodiak for better access to schools, medical facilities, and employment opportunities. They lived in Seward from 1947 to 1950. Thereafter, according to Mr. Feichtinger, and continuing through the 1960's, they resided in Kodiak but "frequented" Woody Island "periodically" or ""on a very regular basis."

After 1943 Rudy Sr. and Jenny stayed overnight on Woody Island at least twice, once in the mid-1960's when Angeline became ill and once in the summer of 1970 when bad weather forced them to stay overnight after a picnic. Jenny was enrolled to Woody Island and died in 1972. She

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listed Woody Island as her permanent residence on April 1, 1970, but listed Kodiak as the place where she resided for two or more years on April 1, 1970, and for an aggregate of 10 or more years. Rudy Sr. was not enrolled to Woody Island and died in 1984.

Jenny worked part-time in a cannery in Kodiak. Rudy Sr. was a fisherman and a boat builder. According to Mr. Feichtinger, Rudy Sr. went to Woody Island at "regular intervals" to fish during the 1960's. Some witnesses testified to his presence on Woody Island in the 1960's and others did not see him there, including some Natives. He kept a smokehouse there for the fish. He also fished elsewhere.

In the case of Village of Litnik, the ALJ's Recommended Decision notes numerous facts about Rudy Sr. and his daughter Esther. First, they and Esther's six children are enrolled to the Village of Litnik. Second, they each signed an Affidavit on August 14, 1973, stating that Litnik was their permanent residence, that they lived for periods of time periodically and seasonally each year in Litnik, that their residence in Litnik consisted of a tent and campsite, and that they hunted, picnicked, fished, beachcombed, and cooked and salted fish there. Third, a long-time resident of Kodiak identified them as residents of Kodiak.

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According to Esther, she, Janet, Lillian, and Anita were all married and living with their families in Kodiak during the 1960's, except for a brief period when Janet lived in Louisiana. They traveled "back and forth" to Woody Island to visit, picnic, pick berries, fish, and beachcomb. Esther identified Rudy Jr. as the only immediate family member who lived on Woody Island for any period of time during the 1960's or 1970.

In 1970 both Esther and her husband were employed in Kodiak. They and their children twice visited Woody Island that year. She testified that she considers Woody Island to be "home" and would like to return there to live when she retires. When asked whether the Sundberg family considered Woody Island to be the center of its family life in 1970, Esther responded that she could not say whether they did or not, as everyone was living in Kodiak.

Prior to 1970, Janet and her family moved to Kenai, Alaska, where she lived until her death. Lillian moved to the lower-48 States in 1986. Each of them listed Woody Island as her permanent residence on April 1, 1970, but listed Kodiak as the place where she resided for two or more years on April 1, 1970, and for an aggregate of 10 or more years.

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Anita was born on September 19, 1937. According to her 1995 affidavit, she considers Woody Island to be "home" and she went there "regularly" in the "past", but stopped going there in 1990 because of arthritis. She stated that she and her family went frequently to Woody Island in the 1960's to visit her grandmother Angeline Maliknak, and to reminisce about old times. Her sister Esther believed that Anita visited Woody Island in 1970 to picnic and fish, and probably stayed overnight on the family fishing boat. The Family List shows that Anita identified Woody Island as her permanent residence on April 1, 1970, but identified Kodiak as the place where she lived for two or more years on April 1, 1970, and as the place where she resided for an aggregate of ten years or more.

Rudy Jr. is developmentally disabled and his parents were his legal guardians until their deaths. From his birth in 1934 until 1941, he lived on Woody Island. He then lived in an institution in Oregon until 1960, when he returned to Alaska. Of the members of the Sundberg family, he used Woody Island the most during the 1960's. He lived with his parents at their house in Kodiak but frequented and sometimes lived on Woody Island until the early 1970's. Other than Nick Pavloff and Johnny Maliknak, he was the Native seen most often on Woody Island during the late 1960's. He was also observed frequently on Woody Island by several witnesses in 1970. However, he was

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hospitalized in Valdez, Alaska, at least for part of 1970, as his sister, Esther testified that he was hospitalized there in 1970, and Valdez is identified on the Family List as the place where he resided for two or more years on April 1, 1970. Woody Island is identified as his place of permanent residence on April 1, 1970, and Kodiak as the place where he resided for an aggregate of 10 years or more. KANA built a small house for him on Woody Island in 1972, but he has been an inpatient at the Kodiak Mental Health Center since the early 1970's.

Herman was born April 13, 1947. According to the Feichtinger Report, Herman "was brought up frequenting Woody Island" and "spent a great deal of time on Woody Island with his father, [including] the year of 1970." Mr. Feichtinger testified that Herman "probably" lived on Woody Island in 1970. There is little evidence to support his conclusions regarding Herman's activities in 1970.

In fact, Esther testified that Herman was serving in the military in Vietnam in 1970. Upon his high school graduation in 1967, he joined the military and served for four years. Thereafter, he lived in Kodiak and then moved to Anchorage where he died. He was enrolled to the Natives of Kodiak. (Leisnoi's Answering Brief, p. 172; Exs. L-DOC-73, -96, -108, 118, -122, -176, -180, -182, -346; BIA-2B, pp. 118, 114, 112-11,14; Tr. 245, 248-54, 305-10, 417, 419, 426, 944, 949-50, 1346-47,

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1458, 1464, 1587, 1638, 1683-85, 1957, 2033, 2070-71, 2712, 2724, 2731, 2808, 2810, 2813-22, 2825, 2828-52).

The objective evidence shows that none of the Sundbergs, except Rudy Jr., lived on Woody Island during the 1960's or 1970. However, Rudy Jr.'s residency must be determined in accordance with his parents' residency because they were his guardians during the decade ending in 1970.

The Sundbergs all resided in Kodiak. There are only vague statements as to the frequency and consistency of their use of Woody Island, such as they went "back and forth" from Kodiak to Woody Island or they "frequented" or "periodically" used Woody Island. Other people in the area identified them as residents of Kodiak and did not identify them, except Rudy Jr., as frequent users of Woody Island during the decade ending in 1970.

There is little to suggest that Woody Island, as opposed to Kodiak, was the center of their Native family life. Many years prior to 1960 they chose to live where opportunities for employment, schooling, and medical care existed. There is no evidence that they substantially relied upon Woody Island for subsistence needs after making that choice. There are only vague references to picking berries and fishing (which may have been recreational in nature) in addition to visiting, picnicking, and

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beachcombing there. Rudy Sr. apparently did catch and dry some fish for subsistence purposes, but he also did this elsewhere, including at Litnik, where he chose to enroll. Nor is there evidence of substantial social interaction on Woody Island in the 1960's, especially after Angeline Maliknak left the island. Esther referenced only two trips there with her parents during the decade ending in 1970.

Statements or testimony regarding any intent to return to Woody Island is limited to Esther's testimony that she intends to return there when she retires and Anita's statement in her affidavit that she considers Woody Island to be "home" and, if not for her health problems, she would return regularly as in the past to visit and reminisce. Esther's testimony does not evidence an intent to return on April 1, 1970. Further, both she and Rudy Sr. enrolled to Litnik, and executed statements and affidavits in support of their enrollment there. Anita's expressed intent to return to visit and reminisce is not sufficient to overcome the evidence that she was a permanent resident of Kodiak in 1970.

The record shows that none of them were permanent residents of the alleged Village on April 1, 1970. It further shows that none of them, except Rudy Jr., lived for a period of time in the alleged Village in 1970.

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11. Natalie Ponchene (res: 1960's)
12. Johnny Ponchene

They are the children of Florence Ponchene, who is the sister of Herman Ponchene. Neither Natalie nor Johnny are enrolled to Woody Island and no testimony or statements from either of them were introduced into evidence.

Natalie was raised at the Kodiak Baptist Mission and the Ponchene family lived in Kodiak, not Woody Island. She cohabitated "on and off" with Johnny Maliknak on Woody Island for unspecified periods of time, including periods in the early 1960's and in 1995. The Feichtinger Report lists her address to be a hotel in Kodiak and does not list her as a 1970 resident of Woody Island. A couple of witnesses observed a girlfriend of Johnny Maliknak's with him on Woody Island in 1970, but none of them identified the girlfriend as being Natalie. No witness specifically identified her as having lived for a period of time on Woody Island or as having frequented it in 1970.

Johnny Ponchene lived "on and off" with Nick and Mary Pavloff for unspecified periods of time in the early 1960's. In 1963 and 1964, he commuted from Kodiak, staying overnight on Woody Island only occasionally, while he worked on clearing land for the FAA VORTAC site on Woody Island. The Feichtinger Report does not list him as a 1960's

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resident or a 1970 resident of Woody Island. (Exs. L-DOC-108, -124, -125, -129, -176, -346; L-CHART-32; Tr. 485, 518-19, 567, 645, 940, 1464-65, 1685, 2397-2420).

The weight of the evidence indicates that neither of them was a permanent resident of the alleged Village on April 1, 1970, and neither lived there for a period of time in 1970.

13. Nicholas William Pavloff, Sr. (dec'd: 1978; res: 1960's & 1970)

He was the son of Angeline and William N. Pavloff and a lifelong resident of Woody Island. He lived in the Pavloff houses, the Frump home, and a house built for him by KANA. He was married twice, first to Christine Malutin and then to Mary Ponchene. Contrary to Protestant's contentions, he is enrolled to Woody Island, as he is listed on the certified Native Roll with his last name misspelled as "Parloff" (Exs. S-6O, pp. 8-15; L-DOC-176; BIA-2B, pp. 158, 22).

His permanent residence was the alleged Village on April 1, 1970, and he did live there for a period of time in 1970.

14. Nicholas A. "Andy" Pavloff Jr.  
(Res: 1960's & 1970)
15. Betty Pavloff Lind (Res: 1970)

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Nicholas and Betty were born on November 18, 1953, and November 29, 1952, respectively, to Nicholas William Pavloff, Sr. and Christine Malutin. Neither Nicholas nor Betty are enrolled to Woody Island and no sworn statements or testimony from them were introduced. Unlike Leisnoi, Koniag does not contend that either of them were permanent residents of Woody Island in 1970.

There is an unsworn interview of them in which Betty states that she never lived on Woody Island. Nicholas remembers living on Woody Island before his parents divorced in the late 1950's.

Thereafter, both Nicholas and Betty lived with their mother in Kodiak for approximately one year. During that year they visited their father at Woody Island on weekends. They then moved to Karluk where they were raised by their maternal grandparents, Herman and Tanya Malutin.

Betty never returned to Woody Island. Nicholas returned to visit his father periodically through the 1960's and 1970's, including for two weeks every summer until approximately 1967. Mr. Feichtinger testified that Nicholas "was not in all likelihood there in 1970." (Ex. L-DOC-161, p. 189, 242; Ex. L-DOC-168, pp. 5-6, 13-14; Tr. 955-56).

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Because they were both minors on April 1, 1970, their permanent residency shall be determined according to that of their maternal grandparents, and not according to that of their father or mother, because, during the decade ending in 1970, the minors lived with their grandparents who stood in loco parentis to the minors. The grandparents lived in Karluk. Neither their permanent residence nor that of the minors was the alleged Village on April 1, 1970. Further, neither Betty nor Nicholas lived there for a period of time in 1970.

16. Mary Ponchene Fadaoff Pavloff(dec'd: 1965; res: 1960's)

17. William Nicholas Pavloff (dec'd: 1985; res: 1960's)

Mary is the niece of Herman Ponchene and became a Woody Island resident when she married Edson Fadaoff, Sr., who was the son of Ella and Nicholas Fadeef(Fadaoff). Mary and Edson had two sons, Edson Fadaoff, Jr., and Joseph Fadaoff. After Edson Sr. disappeared and was presumed drowned in 1958, she married Nicholas William Pavloff, Sr. They had one son, William Nicholas Pavloff, born in 1961.

Mary, Nicholas, and the three boys lived on Woody Island, first in the Fadaoff/Madsen home at

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Site 23 and then in a home built by Nicholas near the beach in the North Village. Mary was diagnosed with cancer in approximately 1963 and she died of the disease in 1965.

Thereafter, Edson Jr. and Joseph were adopted by Ellen and Frank Pagano. William briefly lived with the Richard Hartman family before being adopted and raised by an unnamed family in Anchorage. During his adolescence William visited his father on Woody Island several times, staying approximately two weeks on one occasion.

Neither Mary nor William are enrolled to Woody Island. No statement from either of them was introduced into the record. (Exs. S-6A, p. 22; S-6B, pp. 14-15; S-6O, pp. 8-12, 16-17, 35; L-DOC-73, -79, -103, -108, -129, -346; Tr. 160-69, 218, 939, 941, 952).

Mary was a permanent resident of Woody Island until her death in 1965. By reason of her death, she was not a permanent residence of the alleged Village in 1970 and did not live there for a period of time that year.

Because William was a minor in 1970, his permanent residency shall be determined according to the permanent residence of his adoptive parents. His parents resided in Anchorage and there is no

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evidence that they were permanent residents of Woody Island in 1970. Consequently, William was not a permanent resident of the alleged Village on April 1, 1970, nor did he live there for a period of time in 1970.

18. John (a.k.a. Johnny) Maliknak (res: 1960's & 1970)

He is the son of Angeline and Stephan Maliknak and has lived on Woody Island his entire life. His residences included the Frump house at Site 7 on Woody Island. He is enrolled to Woody Island. (Exs. S-6O, pp. 8-15; BIA-2B, p. 25).

There is no dispute that his permanent residence throughout his lifetime, including on April 1, 1970, was in the area claimed to be the village of Woody Island. Nor is there any dispute that he lived in that area for a period of time in 1970. Protestant does dispute whether that area actually qualified as a "Native village" in 1970.

19. William Wilfred Pavloff (dec'd: 1967; res: 1960's)

He was the son of Angeline and William N. Pavloff. With the exception of six years which he spent in the military, he lived on Woody Island from birth until his death by drowning in 1967. (Tr. 178, 218, 956; Ex. L-DOC-176).

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His permanent residence was the alleged Village from birth until death. By reason of his death in 1967, he was not a permanent resident of the alleged Village in 1970 and did not live there for a period of time in 1970.

20. Agnes Pavloff Frump (dec'd: 1963; res: 1960's)
21. Robert Stretcher
22. Virginia Frump Griffin
23. Mary Anne King (res: 1960's)
24. Harold King (res: 1960's)
25. Brenda Pajurkin aka Frump  
(res: 1960's)

Agnes was the daughter of Angeline and William N. Pavloff and a lifelong resident of Woody Island until her death by drowning in 1963. At the time of her death, she was in the process of moving to Uganik.

She had five children: Robert, Virginia, Maryanne, Harold, and Brenda. Robert, Virginia, and Maryanne were born before 1950, Harold was born in 1950, and Brenda was born in 1955. Only Harold is enrolled to Woody Island. Neither Mr. Feichtinger nor Koniag lists any of them as residents of Woody Island on April 1, 1970.

When infants/toddlers, both Robert and Virginia were adopted out of the family and raised

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outside the Kodiak area. The details of Robert's adoption are not known. Virginia was adopted by a non-Native couple, Lucille and Walt Westman. They lived on Woody Island from 1946 to 1951 while Walt was employed by the FAA. They left the island immediately after adopting Ginny.

Agnes and the three remaining children lived in the Frump home at Site 7 on Woody Island. Maryanne was a close friend of Trisha Chaffin, daughter of Yule Chaffin.

In the fall of 1960 the three remaining children were placed in the Kodiak Baptist Mission, where they lived and received their education during the school year. Each summer until their mother died, they returned to Woody Island to live. Harold also commercially fished during those summers.

Near the time of Agnes' death, Brenda went to live with, but was not adopted by, the Miller family in Seward. Harold and Maryanne were adopted by, and went to live with, the King family in Seward shortly after Agnes' death. All of them were then raised in Seward. Neither the Millers nor the Kings had any ties to Woody Island.

Until he moved with his adoptive family to Idaho in 1969, Harold spent "a lot of time" "visiting" his uncles, Johnny Maliknak and Nicholas Pavloff,

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on Woody Island. Maryanne and Brenda may also have visited Woody Island. Harold did not return to Woody Island thereafter until a brief visit in the early 1990's, at which time he spoke of trying to move back to Woody Island. In the 1990's the siblings reunited and planned to visit Woody Island. (Exs. L-DOC-79, -96, -108, -122, -146, -346; Tr. 180, 509-11, 954, 1578-79, 1796-1814).

None of them were permanent residents of the alleged Village on April 1, 1970. Nor did any of them live for a period of time in the alleged Village in 1970.

### 26. Michle Pavloff

He is the grandson of Nicholai W. Pavloff and the son of Peter Pavloff. He was born in 1930 on Woody Island. His parents died within a year of his birth so he was placed in the Baptist Mission orphanage on Woody Island. Little is known of his activities thereafter.

He married Margie Tarver and they had four children, Mary Anna, Peter Nicholas, Tanya Alexandra, and William Everett, born in 1962, 1964, 1969, and 1971, respectively. Michle and the children are enrolled to Woody Island.

The children were all born in California and the Family List shows that they all listed San

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Francisco, California, as the place where they resided for the two years ending April 1, 1970. Michle's wife never visited Woody Island. Mary and Peter visited Woody Island for the first time in 1979, when Michle took them there to show them around. Nevertheless, the Family List identifies Woody Island as the place of permanent residence on April 1, 1970, for Michle and his children.

The Feichtinger Report does not list Michle or his children as 1960's residents or 1970 residents of Woody Island. Nor does Koniak identify Michle and his children as permanent residents in 1970. There is no sworn statement or testimony from any of them in the record. Mary stated in an unsworn interview that her father expressed a desire to return to Woody Island but did not do so because of the high cost of living and the lack of employment opportunities. (Exs. L-DOC-128; BIA-2B, pp. 126-25; BIA-2A, p. 125)

Michle and his children clearly were not permanent residents of the alleged Village on April 1, 1970, nor did they live there for a period of time in 1970.

**THE FADAOFF FAMILY:** The Fadaoff family traces back to Nicholas Fadeef (Fadaoff) and Fekla (Ella) Balamutoff/Kornilov, who were both placed in the Baptist Mission orphanage on Woody Island near the turn of the century. Nicholas became the

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chief of the alleged Village after his adoptive parent and first chief, Adrian Nanjack, died in the flu epidemic of 1918. Ella and Nicholas married and lived in the Chabitnoy house on Woody Island.

### 27. Fekla "Ella" Balamutoff Kornilov Fadaoff Chabitnoy (dec'd: 1971; res: 1960's)

Shortly after her first husband, Nicholas Fadaoff, died in 1935, she married Mike Chabitnoy, another Mission-raised person. He died in 1958. Ella died in December 1971.

In March of 1964 Ella received a patent to the land encompassing the Chabitnoy, Simeonoff, and Harmon houses (U.S. Survey 3630). In May 1971, shortly before her death, she sold the land to a non-Native couple, Fred and Ruth Brechan, for \$2,500.

She is not enrolled to Woody Island. The Feichtinger Report lists her as a 1960's resident of Woody Island but not as a 1970 resident. Nor does Koniag list her as a permanent resident in 1970.

She lived on Woody Island from approximately 1895 until she moved to Kodiak in the early 1960's prior to the 1964 earthquake. She moved to have better access to medical services because of her failing health and to be near her son Cecil Chabitnoy who acquired a job at the Naval

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base outside of Kodiak.

Thereafter, she lived for periods of time in the summertime on Woody Island in the South Village until she grew too old to do so. Also, the island became too lonely for her, as her loved ones died or left the island: her husband and one of her sons, Edison Fadaoff, Sr., died in 1958 and her other four sons left during the early 1960's.

Ella's granddaughter, Christina Hoen, testified that Ella told her in 1969 that she did not want to live on Woody Island again because of her memories of her son, James Fadaoff, who committed suicide that year while imprisoned for killing his common law wife, Rosemary Chilliak. Christina hypothesized that her grandmother's primary reason for selling her land to non-Natives in 1971 was her son's suicide and possibly one other death in the family (a possible reference to the death of Ella's grandson Danny Harmon in 1967). (Exs. L-DOC-1, -55, -346, -347, -351; S-6A, p. 31; S-6B, p. 5; S-6D, pp. 6-7; S-6O, pp. 19-20, 34; Tr. 461, 528-29, 971, 2888-89, 3003-04).

Ella was a permanent resident of the alleged Village at least until she moved to Kodiak in the early 1960's. However, by April 1, 1970, she clearly was not a permanent resident of the alleged Village. She was residing in Kodiak and did not intend to return to Woody Island because of deaths in the

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family, the absence of loved ones on the island, and the effects of aging and ill health. She did not live for a period of time in the alleged Village in 1970.

28. Michle "Mickey" Chabitnoy (res: 1960's)
29. Cecil Chabitnoy (res: 1960's, 1970)

They are the sons of Mike and Ella Chabitnoy. They were raised on Woody Island. Neither of them are enrolled to Woody Island.

No testimony or statements from Mickey were introduced. Neither Koniag nor Mr. Feichtinger identify him as a permanent resident of Woody Island in 1970.

He joined the Navy in the approximately 1956 and suffered a brain injury during a stop in New York City in 1960. He returned to Woody Island where he lived until he was institutionalized in Oregon in 1963 or 1964. He lived with his mother and Cecil in the Chabitnoy house until they moved to Kodiak.

Cecil and his mother moved to Kodiak sometime prior to the 1964 earthquake, with Cecil accepting a job at the Naval base on the outskirts of Kodiak. According to Mr. Feichtinger, Cecil lived on Woody Island thereafter "periodically" for "various periods of time" until his death on Woody

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Island in 1995. He was still living in Kodiak when he died. There is supporting evidence that he spent time on Woody Island after the earthquake, including during 1969 and 1970, but that evidence is very vague as to the nature and extent of his usage of the island. In 1970 Cecil was not living on Woody Island, according to Zelma Stone.

Cecil did not testify but did execute an affidavit. He stated in pertinent part, "Woody Island has been my home since birth. My family and cultural ties are all there. I still periodically go to Woody Island to live. My family has a long history there and my culture is linked to Woody Island Village." (Leisnoi's Answering Brief, p. 172; Exs. L-DOC-73, -346; S-6D, pp. 8-11; S-6O, pp. 19-20, 34; Tr. 461, 465, 972-73, 1638).

Neither of them was a permanent resident of the alleged Village on April 1, 1970, nor did either live there for a period of time in 1970. Mickey has been institutionalized since 1963 or 1964.

Cecil had moved to Kodiak for work in 1964. The evidence of Cecil's use is generally limited to vague statements that he spent time or lived on Woody Island periodically. For instance, Kelly Simeonoff Jr. stated in an affidavit that Cecil lived on Woody Island after Kelly was released from the military in January 1964, but the extent of his residency was vaguely described as "at various

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times." (Ex. L-DOC-346)

This vague evidence is juxtaposed against the voluminous evidence that the only Natives who lived in the alleged Village with any frequency or continuity after 1966 were William Wilfred Pavloff until he died in 1967, Johnny Maliknak, Nicholas Pavloff, and possibly Rudy Sundberg Jr. and Christina Hoen. Cecil's own half-sister, Natalie Simeonoff, stated in an interview that the island became too lonely for their mother in the 1960's because her loved ones, including Cecil, had left the island.

While an affidavit from Cecil was submitted, the affidavit provides very little detail regarding his alleged "periodic" residency on Woody Island, either as to duration, time periods, or activities. Nor does it explain why Cecil did not enroll to Woody Island or why he generally lived in Kodiak rather than Woody Island.

30. Simeon "Buddy" Fadaoff (dec'd: 1993; res: 1960's, 1970)

He was the son of Nicholas and Ella Fadaoff. He lived on Woody Island from his birth in 1930 until the late 1950's or early 1960's, when he married and moved to the State of Washington. Thereafter, he was observed on Woody Island only once during the decade ending in 1970. That visit

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took place in 1969. The Feichtinger Report states that he visited Woody Island in 1970, but there is no supporting evidence for this statement.

He did not enroll to Woody Island. No testimony or statement from him was introduced. Koniag does not list him as a permanent resident of Woody Island in 1970. (Tr. 985; Exs. L-DOC-125, -346)

He was not a permanent resident of the alleged Village in 1970, nor did he live there for a period of time in 1970.

31. James O. Fadaoff (dec'd: 1969; res: 1960's)

He was the son of Nicholas and Ella Fadaoff. He lived on Woody Island - mostly in the Chabitnoy house - from birth until he was arrested shortly after he killed Rosemary Challiak, his common law wife, on December 26, 1965. He pled guilty to manslaughter and died in prison in 1969. He was the last full-time resident of the Chabitnoy house. (Tr. 957, 960, 966-67; Exs. S-60, p. 34, L-DOC-73, and L-DOC-117; Armstrong Depo., pp. 68-69).

Obviously, his death in 1969 precludes him from being a permanent resident of the alleged Village in 1970 or from having lived there for a

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period of time in 1970.

32. Rosemary Challiak (dec'd: 1965; res: 1960's)

She was killed by her common law husband, James Fadaoff, on December 26, 1965. It is unclear how long she lived with James prior to her death.

Obviously, her death in 1965 precludes her from being a permanent resident of the alleged Village in 1970 or from having lived there for a period of time in 1970.

33. John Michael Waller (res: 1970)

He is enrolled to Woody Island. Statements from him were introduced via live testimony and by affidavit. He listed Woody Island as his permanent residence on April 1, 1970, but listed Kodiak as the place where he resided for two or more years on April 1, 1970, and as the place where he resided for an aggregate of 10 or more years.

He was born in 1947 to Eugene Litz and Marjorie Fadaoff, who was the daughter of Nicholas and Ella Fadaoff. His mother was raised at the Woody Island Baptist Mission.

As a baby he was adopted by John and Opal Waller, non-Natives, and raised at the Naval base

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on Kodiak Island until 1961, when the Waller's moved to Kodiak City. He did not discover the identity of his natural parents until after 1970.

From 1962 to 1966 he made "frequent" trips with friends to Woody Island and other islands for recreational hunting and gathering, beachcombing, exploring, and camping. The nearby islands were his "playground." In 1966, he graduated from high school and began attending college, first in the State of Washington and then in the State of Oregon. He visited Woody Island during the summers, including the summer of 1970. After graduating from college in 1971, he returned to Kodiak to live. Several witnesses testified that they had never seen him on Woody Island and that he was a resident of Kodiak.

He has served as the President and a Director of Leisnoi. He testified that he would like to go back to Woody Island and identified a homesite in the former FAA housing area in which he would choose to reside. (Exs. L-DOC-419; BIA-2B, p. 11; Tr. 186, 246, 305-10, 3127-32, 3136, 3141-46 ).

The evidence shows that Woody Island and other islands were merely his playground in his adolescence. It does not establish that the alleged Village was the center of his family life, Native or otherwise, at any time during the decade ending in 1970. He never lived there or engaged in

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subsistence activities of any significance. The alleged Village was not his permanent residence on April 1, 1970, and he did not live there for a period of time in 1970.

34. Natalie Fadaoff Simeonoff (dec'd: 1992; res: 1960's)
35. Kelly Simeonoff, Sr. (dec'd: 1997; res: 1960's)
36. Ellen Mae Pagano
37. Edson Nicholas Fadaoff, Jr. (res: 1960's)
38. Joseph Francis Fadaoff (res: 1960's)
39. Peter Simeonoff (dec'd: 1973; res: 1960's)
40. Freddy Simeonoff (dec'd: 1970; res: 1960's)
41. Kelly Simeonoff, Jr. (res: 1960's)
42. Christina Simeonoff Hoen (res: 1960's, 1970)
43. Cien Marie Hoen Weeks (res: 1960's, 1970)
44. Chrislyn Kay Hoen (res: 1960's, 1970)

Freddy is not enrolled anywhere, as he was killed during the Viet Nam War in April 1970. Natalie, Kelly Sr., and Peter are enrolled to Uganik and Ellen, Edson Jr., Joseph, Kelly Jr., Christina, Cien, and Chrislyn originally enrolled "at large" but

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then changed their enrollment to Woody Island. Joseph is not sure why he enrolled to Woody Island.

Natalie was the daughter of Nicholas and Ella Fadaoff. In the 1930's, she married Kelly Sr. and they built a house near the Chabitnoy house in the South Village in approximately 1942. That house is referred to as the Simeonoff house. In 1946, they bought a home in Kodiak. Ellen, Peter, Freddy, Kelly Jr., and Christina are some of their children.

The family moved back and forth between Kodiak and Woody Island in accordance with the availability of employment and schooling until the early 1960's, living primarily on Woody Island from 1943 to 1956. Natalie, Kelly Sr., Freddy, and Peter also lived primarily on Woody Island for a year or two in the early 1960's.

Prior to the 1964 earthquake Natalie and Kelly Sr. moved to Uganik, where they lived each summer and two or three months of each winter until approximately 1975. They spent three or four months of each winter in Kodiak. Their children remained in Kodiak, although Peter eventually began living with them most of the time both in Uganik and Kodiak.

After the earthquake, no family gatherings, whether for birthdays, Christmas, or Easter, were

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held on Woody Island. They did leave a piano and furniture in their home on Woody Island, and the evidence is conflicting as to whether that furniture remained there through 1970. In the 1960's, Natalie and Kelly Sr. purportedly "regularly visited" Woody Island and stayed for "extended periods of time."

However, Natalie stated in an interview that they gradually stopped going there, except "once in a while," in the 1960's because it was too lonely there for her mother Ella Chabitnoy after Ella's husband (Mike Chabitnoy) died and Ella's sons (Buddy Fadaoff, James Fadaoff, Cecil Chabitnoy, and Mickey Chabitnoy) left the island. Mike died in 1958, Buddy and Cecil left before 1964 earthquake, Mickey left in 1963 or 1964, and James left in 1965. In 1973 the visits of Kelly Sr. and Natalie to Woody Island tapered off because they bought property and began establishing a home in Bell Flats.

In Uganik, Kelly Sr. worked as a winter watchman for a cannery and fished in the summers. Natalie and Kelly established a garden and built a house there where their children would visit them at Christmas and during the summer. Natalie originally enrolled to Kodiak and then changed her enrollment to Uganik. In the case of Alaska Conservation Society v. Village of Uganik, ANCAB VE 74-99, VE 74-105, VE 74-109 (October 21, 1974), ALJ's Recommended Decision, at 20-23, 26-28,

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Natalie testified, Kelly Sr. concurred, and both the Administrative Law Judge and ANCAB found that Natalie, Kelly Sr., and Peter were permanent residents of Uganik as of April 1, 1970.

Ellen married Frank Pagano. They adopted and raised Edison Jr. and Joseph after the death of their mother, Mary Ponchene, in 1965. Their father, Edison Nicholas Fadaoff, Sr., who was the son of Nicholas and Ella Fadaoff, had disappeared in approximately 1958 and was presumed drowned. Edison Jr., born December 18, 1956, and Joseph, born August 31, 1954, lived with Mary on Woody Island until 1965.

The Pagano family lived in Kodiak until the mid-1960's, when they moved to Anchorage because Frank obtained a better job there. While living in Anchorage, they would "vacation" in Kodiak or Woody Island in the summer. They visited Woody Island "occasionally", mostly for day-trips, staying a few hours at least one day each year. They did not occupy a house there in 1970. Frank, Ellen, Edson Jr., and Joseph all listed Woody Island as their permanent residence on April 1, 1970, but listed Anchorage as the place where they resided for two or more years on April 1, 1970, and Kodiak as the place where they resided for an aggregate of 10 or more years.

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Kelly Jr. joined the military in 1958. He returned for three months but could not find work so he rejoined. In approximately January 1964 he finished his military career and returned to the Kodiak area. Upon his return, he went to work in Kodiak and he and Peter engaged in subsistence activities and visited their grandmother Ella on Woody Island. They also engaged in subsistence activities elsewhere, such as Uganik.

Kelly Jr. purportedly "frequented" Woody Island. In the summers he spent time there tending cattle and the family's garden. He left clothing and modeling supplies there as evidence of his intent to return, and considered Woody Island to be "home".

However, he also testified that, in 1970, he did not go to Woody Island and it was not the center of his Native family life. That year, he traveled between and lived in Kodiak and Anchorage while he looked for work. In the early 1970's, he went to work for Krafts' Men's Department, married, and began raising children in Anchorage, where he stayed for 23 years. He now lives in Kodiak. He listed Woody Island as his permanent residence on April 1, 1970, but listed Anchorage as the place where he resided for two or more years on April 1, 1970, and Kodiak as the place where he resided for an aggregate of 10 or more years.

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He gave up his dream of living on Woody Island when he began raising children because it was impractical to live there. He explained that most people had moved away from Woody Island by the late 1960's to be closer to medical services, schools, and employment opportunities. He stated that employment choices played a huge role in determining where Natives chose to live.

Freddy, born in 1949, was killed in Vietnam in April 1970. Prior to joining the military, Freddy lived with his parents when he was not attending school in Sitka, Alaska.

Peter loved Woody Island and spent a "great deal of time" there. However, he also found that it was impractical to live there because it was not safe to travel to and from Woody Island by skiff to access medical care for his children. The weather would not permit it. In 1970, he was living in Uganik. Neither Mr. Feichtinger nor Koniag included Peter in their lists of permanent residents of Woody Island in 1970. He died in 1973.

Christina married in 1962 and had two daughters, Cien, born November 28, 1963, and Chrislyn, born May 4, 1969. From 1956 onward, Christina resided in Kodiak, excepting that she stated by deposition and unsworn interview that she used the Simeonoff home on Woody Island as follows: (1) she spent each summer there from 1956

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through 1961, (2) she spent less time there in 1962 and 1963 because her husband was in the Navy, (3) she and her family lived there from May 1964 until December 1964, and (4) she and her children lived there each summer from 1965 to 1973, including 8 or 9 weeks in 1970.

In May 1969 she and her husband began operating a sporting goods store in Kodiak. She clarified in live testimony that she and the children did not live 8 or 9 weeks on Woody Island in 1970, but merely spent weekends and some evenings there because she and her husband were busy operating the store. Her husband testified that their visits were limited to 10 or 12 weekends per year and some "good" days, not just in 1970 but throughout the decade ending in 1970. He added that they went there for recreation, picking berries, and rabbit hunting and did not stay longer than a weekend at one time.

She stated in an affidavit that they intended to stay on Woody Island permanently in 1964, but ceased living there primarily because the Simeonoff house no longer had running water. She elaborated that the water pipeline damage forced them to carry water from the Upper Lake, which they found too burdensome for their young family.

In a deposition, however, she dismissed as "no big situation" the difficulty of living on Woody

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Island at that time with an "erratic" water supply, because "there are quite a few wells and springs over there that have been there for years and a good supply of fresh water." Her husband testified that they moved back to Kodiak because it was too difficult to commute from Woody Island to his job in Kodiak and because it was "easier" to live in Kodiak. Christina confirmed the difficulty of the commute, stating that her husband often stayed overnight in Kodiak to avoid the commute.

She further testified that she considers Woody Island to be home, but that, in 1970, it was not possible for her to return to Woody Island to live because of the lack of employment opportunities. She would return to Woody Island to live if the circumstances were right, i.e., if their employment and earnings were such that it was feasible and affordable to do so.

She paid taxes on the Simeonoff home and offered her mother \$15,000 to purchase her land on Woody Island before she sold it to the Brechan's for \$2,500. Christina and her children listed Woody Island as her permanent residence on April 1, 1970 and Kodiak as the place where they resided for two or more years on April 1, 1970. Christina also listed Kodiak as the place where she resided for an aggregate of 10 or more years. (Village of Uganik, supra, ALJ's Recommended Decision, at 20-23, 26-28; Exs. L-DOC-1, -129, -332 -346, -347, -350,

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-351, -A17; S-6O, p. 76, 91, 103; S-6F, pp. 15-27, 30, 33-35; S-6D, pp. 15, 17; BIA-2B, pp. 122, 102-00, 33, 29, 22, 15; Tr. 247, 980-83, 1046-47, 1066-75, 1084, 1090, 2108-37, 2695-96, 2944, 2964, 2977, 2981, 2985-93, 2997-99).

In the Village of Uganik case, Natalie, Kelly Sr., and Peter were found to be permanent residents of that village on April 1, 1970. The evidence presented in this case does not lead to a different conclusion. Further, they did not live for a period of time in the alleged Village in 1970.

While Respondents do not allege that Freddy was a permanent resident on April 1, 1970, he conceivably could have been one because he did not die in battle until later that month. However, he died at age 21 and had not established a residence independent of his parents prior to entering the military. Consequently, his permanent resident is determined according to that of his parents and therefore he was not a permanent resident of the alleged Village on April 1, 1970.

Edison Jr. and Joseph were minors on April 1, 1970. Consequently, their permanent residence is determined according to that of their adoptive parents, Ellen and Frank Pagano.

After the Pagano's moved to Anchorage in the mid-1960's, there is no evidence that they

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visited Woody Island with any frequency or consistency, that they used it for subsistence purposes, or that they lived there at all. They did not maintain a house there; they lived and worked in Anchorage and merely vacationed at Woody Island occasionally on day-trips. They were not permanent residents of Woody Island on April 1, 1970, and did not live there for a period of time in 1970.

Kelly Jr. made some use of Woody Island and the Simeonoff house there during the 1960's. However, he testified that in 1970 he did not visit there nor consider it the center of his Native family life, as he was living in Anchorage and Kodiak while he focused upon finding employment. Like so many other Natives, his fondness for Woody Island was overridden by a desire to be gainfully employed in the modern cash economy. He was not a permanent resident of the alleged Village on April 1, 1970, and he did not live there for a period of time in 1970.

The permanent residency of Christina is the most difficult to determine. She lived there in 1964 and clearly spent considerable time at the Simeonoff house each summer thereafter until 1973. She maintained the garden there, paid the taxes on the home, and attempted to buy the land from her grandmother. Nevertheless, her own testimony reveals that she abandoned by 1970 the

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continuing intent to return to Woody Island to live. By that time, she was willing to return to Woody Island to live only if the circumstances were right, i.e., if her family's employment and earnings were such that it was feasible and affordable to do so. Her lack of a continuing intent to return to the alleged Village is further evidenced by the efforts of herself and her husband to establish a home in Bell Flats rather than on Woody Island, beginning in 1973. Consequently, she was not a permanent resident of the alleged Village on April 1, 1970.

Because her children, Cien and Chrislyn, were minors on April 1, 1970, their permanent resident is determined according to that of their parents. Consequently, their permanent residence was not the alleged Village on April 1, 1970.

45. Anastasia "Nettie" Fadaoff Harmon Hartle (dec'd: 1976; res: 1960's)
46. James Gane Harmon Hartle (res: 1960's, 1970)

Anastasia was the daughter of Nicholas and Ella Fadaoff. She was born and raised on Woody Island. She first married Raymond Royal Harmon, who died in a boating accident in the 1940's. Her second marriage was to Ernie Hartle, a commercial fisherman. She died in 1976.

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She and her family lived in the Harmon house from 1952 until approximately 1959, when they moved to Kodiak. In approximately 1961, Ernie, Anastasia, and her youngest son, James Gane Harmon Hartle, born December 25, 1952, moved to the State of Washington because Ernie accepted employment there. They remained in Washington, except for the following periods when they returned to Kodiak to live. First, several months after the 1964 earthquake, they returned and stayed until May or June of 1965. Second, in 1968 they returned for an unspecified length of time. That year was the last year that Ernie fished commercially. He then worked for a cedar mill in Washington. Third, James alone returned in 1970 for commercial salmon fishing.

During their stays in Kodiak, they did "frequent[ ] Woody Island many times," including living in the Fadaoff/Madsen house during the summer of 1964. After 1964, Anastasia and Ernie never returned to Woody Island to live.

During the summers of both 1968 and 1970, James fished commercially with his half-brother Paul Harmon on the boat named "Banshee". They obtained their food and supplies in Kodiak, but sometimes on the weekends they camped or slept on their boat at Woody Island. James testified that he did this "several" times during 1970. Paul testified that they did so at least 4 or 5 times that year to

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"goof off", swim, and visit their brother Daniel's grave. James referred to Woody Island as "home" and testified that he wanted to return from Washington to Woody Island to live but did not do so because of a lack of employment opportunities on Woody Island.

No testimony or statement from Anastasia was introduced. James Hartle testified that his parents told him that they would like to have moved back to Woody Island. Conversely, Patricia Hampton and Yule Chaffin related hearsay statements that Anastasia and Ernie did not intend to return to Woody Island to live because of the lack of employment opportunities.

Both James and Anastasia are enrolled to Woody Island. The Family List gives the same address in Amanda Park, Washington for both James and Anastasia. James lived with Anastasia throughout the 1960's and 1970. James listed Amanda Park in response to the question of where he resided for two or more years on April 1, 1970, while Anastasia gave no response. James also listed Amanda Park as the place where he resided for an aggregate of 10 or more years; Anastasia listed Kodiak. Anastasia listed Woody Island as her permanent residence on April 1, 1970. (Tr. 973-76, 1628-29, 1642-43, 1649, 1652-58; Exs. L-DOC-124, -125, -385, p. 7,060; BIA-2B, pp. 96, 30)

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Because James was a minor on April 1, 1970, his permanent residence is determined according to that of his parents. His parents did not return to Woody Island to live after the summer of 1964. They lived and worked in the State of Washington and did not even visit the island frequently or consistently. Evidence of their subjective intent to return is conflicting, and the objective evidence is strongly supportive of a finding that they were not permanent residents of the alleged Village on April 1, 1970.

Nor did Anastasia or James live there for a period of time in the alleged Village in 1970. After 1964 Anastasia never returned there to live. James camped there primarily for recreation only a half-dozen times in 1970, staying on his boat at least one of those occasions.

47. Daniel L. Harmon (res: 1960's)
48. Paul R. Harmon (res: 1960's, 1970)
49. Maurice W. Harmon (res: 1960's, 1970)
50. Rayna Joyce Harmon Lohse Monroe Austerhouse (res: 1960's)
51. Leanna Ellen Harmon King Castillo (res: 1960's)

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They are the children of Anastasia and Raymond Harmon. The family lived on Woody Island - mostly in the Harmon house - from 1950 through approximately 1959.

All of the males joined the military. Daniel joined in 1962 or 1963, was killed in the Viet Nam War in 1967, and is buried on Woody Island where he had hoped to build a house someday, according to his brother Maurice.

Maurice enlisted in 1959 and returned in 1961. He then lived on Woody Island for a few months before moving to Kodiak where employment was available. He was in the National Guard during the 1964 earthquake. After his release from the Guard, he lived in the Chabitnoy house with James Fadaoff for a couple of months. He moved back and forth between Kodiak and Woody Island several times.

After 1964, Maurice stayed overnight at Woody Island for only 2 or 3 nights. Those overnight stays occurred in 1970 while he overhauled seine. In 1970 he also made two or three day-trips there to visit Daniel's grave, but he did not live there. Mr. Feichtinger's vague statement that Maurice spent a "considerable amount" of time on Woody Island in 1970 engaged in "traditional and subsistence" activities is a

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misleading exaggeration.

Maurice fished commercially and for subsistence purposes in the Kalsin Bay area throughout the 1960's. Maurice moved to Washington State by 1968 to attend welding school. In 1970 he and his wife and children were living in Washington, although Maurice also commercially fished in Alaska. His children have never been to Woody Island since they moved to Washington.

Paul enlisted in 1960. In 1963 he got married in Hawaii. In 1964, he left military service and he and his wife had their first child while they were living in the State of Washington.

Paul returned to the Kodiak area in 1965. Like Maurice, Paul fished commercially and for subsistence purposes in the Kalsin Bay area throughout the 1960's. From 1965 through 1970 he lived either in Kodiak or Washington State, typically living in Kodiak during the spring, summer, and fall while he commercially fished and living in the Amanda Park area of Washington during the winter. He worked in a shake mill there.

Paul stated that, upon his return to Kodiak in 1965, he lived on a fishing boat. He stated, "I frequently went to live for periods on Woody Island where I would stay with my Uncle James Fadaoff or with Johnny Maliknak. I fished during this period

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off and on and would frequently tie up at Woody Island and stay there when not fishing." "This period" likely refers to 1965, as his Uncle James Fadaoff ceased living on Woody Island at the end of 1965. His wife and child joined him in Kodiak later that year where they rented an apartment or house. His family stayed with him in Kodiak through at least 1966. The family visited but never lived on Woody Island. He also indicated that he was living "off and on" in Kodiak and Woody Island in 1967.

As previously discussed, in 1968 and 1970, he commercially fished with his half-brother James Hartle on his boat named "Banshee" They obtained their food and supplies in Kodiak, but sometimes on the weekends they camped or slept on their boat at Woody Island. He remembered spending the night on Woody Island at least 4 or 5 times in 1970, either staying on a boat or with his uncle Johnny Maliknak. He went there to "goof off", swim, and visit his brother Daniel's grave.

Both Leanna and Rayna moved to Kodiak in approximately 1959 and married. According to her brothers, Leanna "did not return much to [Woody] Island after that \* \* \*." She was best friends with Patricia Hampton and Patricia never saw Leanna again on Woody Island after 1959. Leanna was living in the State of Washington in 1970.

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According to Mr. Feichtinger, Rayna and her husband visited Woody Island "on a very, very regular basis, often staying days at a time," until 1967 when she divorced her husband and relocated to the State of Washington. In fact, until a recent visit, she had not been on Woody Island since her brother Danny died in 1967.

Leanna and Rayna are enrolled to Woody Island. Leanna listed Woody Island as her permanent residence on April 1, 1970, but listed Seattle as the place where she resided for two or more years on April 1, 1970, and Kodiak as the place where she resided for an aggregate of 10 or more years. Rayna listed Woody Island as her permanent residence on April 1, 1970, and as the place where she resided for an aggregate of 10 or more years, and listed Bremerton, Washington, as the place where she resided for two or more years on April 1, 1970.

Maurice and Paul are not enrolled to Woody Island. The Family List shows that Maurice listed Woody Island as his permanent residence on April 1, 1970, the place where he resided for two or more years on April 1, 1970, and the place where he resided for an aggregate of 10 or more years. Paul listed Woody Island as his permanent residence on April 1, 1970, but did not identify a place where he resided for two or more years or for an aggregate of 10 or more years. The Family List identifies both

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their addresses as an address in Amanda Park, Washington, which is the same as their mother's address. Both them still resided in Washington as of the date of hearing. Both stated by affidavit that they would like to return to Woody Island to live but have not done so because of the damage to the water system, the closing of the FAA facilities and related ferry service, the school closing, and the lack of employment opportunities. (Tr. 189, 247, 961, 977-78, 980, 1003-04, 1450, 1465-69, 1574-79, 1585-87, 1599-05, 1601-06, 1608, 1611, 1619-21, 1642-43, 1665-67, 1676-85, 1688, 3523-24; Exs. L-DOC-81, -85, -117, -118, -124, -125; BIA-2B, pp. 132, 97, 36, 31-30, 23).

Daniel, who died in 1967, obviously was not a permanent resident of the alleged Village in 1970, nor did he live for a period of time there in 1970.

Both Maurice and Paul basically lived where there was work or schooling, either in the State of Washington or in Kodiak during breaks from commercial fishing. The Harmon house was not standing by 1970 and there is no evidence that they used it after the earthquake. Instead, during their infrequent visits in the late 1960's and 1970, they either did not stay the night or stayed on their boats, camped, or roomed with relatives. Further, there is little evidence that they relied upon Woody Island for subsistence purposes during the decade ending in 1970.

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They stated that they have not returned to Woody Island to live for various reasons. However, there are wells to compensate for the lack of running water. Further, the closing of the FAA facility and ferry did not occur until after 1970, and they chose to live in Washington and Kodiak long before the closing of the school in May 1969. Once again, it is the lack of employment opportunities that stands out as the primary reason for choosing not to live in the alleged Village up through 1970.

Neither Paul nor Maurice was a permanent resident of the alleged Village on April 1, 1970. Neither of them lived there for a period of time in 1970. Paul spent the most time there in 1970, but that was only about a half-dozen weekends to "goof off", swim, and visit his brother's grave.

Rayna and Leanna spent even less time on Woody Island. Rayna relocated to the State of Washington and did not visit Woody Island after 1967 for approximately 30 years. Leanna did not return much, if at all, after 1959. They did not live there after 1959 or attempt to maintain the Harmon house. They were not permanent residents of the alleged Village on April 1, 1970, and did not live there for a period of time in 1970.

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### 52. Michael Nicholas "Mitch" Komm Gregoroff (res: 1960's, 1970)

He is not enrolled to Woody Island. He applied to enroll to the Natives of Kodiak and listed his mother's address in Amanda Park, Washington as his place of permanent residence on April 1, 1970. He listed Kodiak as the place where he resided for an aggregate of 10 years or more. He testified and executed affidavits introduced into evidence.

He was born in 1937 to Anastasia Fadaoff Harmon Hartle and Kelly Gregoroff. He was raised by the Komm family in Kodiak and the State of Washington. He spent 8 years of his early childhood living in the State of Washington because of health problems.

In 1950 he began living with his mother and half-siblings on Woody Island, first in the Pavloff house and then in the Harmon house. He lived there until approximately 1960, when he joined the military. Prior to the 1964 earthquake and tidal waves he returned to Kodiak, where he took up residence and worked for a cannery.

He then moved to the State of Washington in 1964 because the canneries in Kodiak were wiped out by the tidal waves. However, by 1966 there were 18 seafood plants in Kodiak and 8 more at

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other points on Kodiak Island where he could have sought employment. Furthermore, he continued to work in Alaska from 1964 onward, fishing commercially and for subsistence purposes nine months each year in Adak and Kalsin Bay.

He lived in Washington the other three months of each year until 1969. He may also have lived on Woody Island sporadically for brief periods of time while fishing. In 1969 and 1970 he lived on the boat named "Joel-B", using Kodiak as a base of operations for commercial fishing. In 1970, he did not stay overnight on Woody Island and did not visit there much.

He referred to both Woody Island and the Joel-B as "home." He does not live on Woody Island because there is no ferry service to access Kodiak where employment opportunities, health care, and schools are located and because there is no running water on Woody Island. (Leisnoi's Answering Brief, p. 172; Tr. 419, 974-75, 1003-04, 1400, 1433-38, 1450, 1453-56, 1463, 1604, 1608, 1611; Exs. L-DOC-73, -117, -118, -129, -149).

His permanent residence was not the alleged Village on April 1, 1970, nor did he live there for a period of time in 1970. Until 1969 he returned to Washington, not Woody Island, after commercial fishing to be with his family. In 1969 and 1970 his base of operations to which he returned was

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Kodiak. His visits to Woody Island were not frequent nor substantially for subsistence purposes. He did not stay overnight nor visit much in 1970. He specifically chose not to live or enroll there.

The reasons for his choice are similar to those of his half-brothers, Paul and Maurice Harmon. As with his half-brothers, the lack of employment opportunities stands out as the primary reason for his choice up through 1970.

53. Alexander "Alexie" John Fadaoff, Sr. (dec'd: 1988; res: 1960's)
54. Charlotte White (res: 1960's)
55. Alexander John Fadaoff, Jr. (res: 1960's)
56. David James Fadaoff (res: 1960's)

Alexander Sr. was born to Anastasia Fadaoff in 1934 and was raised in the Kodiak Baptist Mission. His father is unknown. He was married to Charlotte in the 1950's. He died in Seattle in 1988 and is buried on Woody Island.

Charlotte and Alexander Sr. had two children, Alexander Jr., born in 1955, and David, born in 1959. According to Mr. Feichtinger, the family lived primarily in Kodiak but "visit[ed] frequently for periods of time [Anastasia and Ella

## APPENDIX E-156

Fadaoff] on Woody Island" during the 1960's. There is no doubt that Alexander Sr. did visit, as he was seen fishing there in 1970. However, life-long Woody Island resident Johnny Maliknak identified 41 Natives as having resided on Woody Island at some time during the period of April 1, 1960, to April 1, 1970, and Alexander Sr. and his family were not included on that list. Zelma Stone also testified that they never lived on Woody Island, but, rather, alternated between living in Kodiak and Seattle.

None of them is enrolled to Woody Island and none is listed as a 1970 resident thereof in the Feichtinger Report. No statement or testimony from any of them was introduced into evidence. The Family List shows that Alexander Sr. and Alexander Jr. both listed Woody Island as their permanent residence on April 1, 1970, but listed Seattle as the place where they resided for two or more years on April 1, 1970, and Kodiak as the place where they resided for an aggregate of 10 or more years. (Tr. 483-84, 509, 974, 979, 1466-67; Exs. L-DOC-16, -108, -118, -161, p. 91; -176, -385, p. 7004; BIA-2B, pp. 40-9).

The weight of the evidence shows that none of them was a permanent resident of the alleged Village at any time during the decade ending in 1970. It further shows that none of them lived for a period of time there in 1970.

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### CHYA FAMILY

57. Mary Shuravloff Chya (dec'd: 1996; res: 1970)
58. John Chya (dec'd: 1984; res: 1970)
  59. Betty Chya Wolf Stowers
  60. Walda Chya Hoff (res: 1970)
    61. Marvin Love (res: 1970)
    62. David Love (res: 1970)
    63. Keith Abraham (res: 1970)
    64. Randy Abraham (res: 1970)
  65. Nettie Carol Chya Matthews
  66. Norma Dale Larsen
  67. Jonna Chya Purcell
  68. Virginia Lee Deveau
  69. John William Chya, Jr. (res: 1970)
  70. Michael George Chya (res: 1970)
  71. Nova Lemore Chya (dec'd: 1988; res: 1970)
  72. Edward Chya (res: 1970)
  73. Tamera Rae Chya (dec'd: 1997; res: 1970)

The only statements from these Natives introduced into evidence are: the 1978 deposition of Mary, unsworn interviews of Michael, Edward, Betty, Nettie, and Jonna, and affidavits submitted with Leisnoi's application. Mary, John, Norma, Jonna, Virginia, John Jr., and Michael executed affidavits discussing their purported use and occupancy of Woody Island and they signed a

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separate affidavit stating that Woody Island was temporarily unoccupied in 1970 because of the closing of the school there in 1969.

Mary was born in 1921 and John was born in 1904. Her grandparents lived on Woody Island, her parents maintained gardens there, and she visited Woody Island as a child. John's parents were raised on Woody Island at the Baptist Mission and John lived on Woody Island as a child.

Mary lived in Kodiak her entire life and John lived in Kodiak for his entire adult life. John worked for Kodiak Electric Association for 29 years. They married and had numerous children, including Betty, Walda, Nettie, Norma, Jonna, Virginia, John Jr., Michael, Nova, Edward, and Tamera, born in 1940, 1943, 1944, 1949, 1950, 1952 (June 7), 1957, 1958, 1961, 1963, and 1964, respectively. The family lived in Kodiak, but visited Woody Island to picnic, beachcomb, pick berries, hunt, and fish.

Mary, John, and the children, except Walda, are all enrolled to Woody Island. Mary, John, and the five youngest children originally enrolled elsewhere. Walda enrolled to the Village of Bell Flats and her children, Keith, Randy, Marvin Jr., and David, born in 1962, 1964, 1967, and 1969, respectively, are not enrolled to Woody Island.

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The Woody Island enrollees all listed Woody Island as their permanent residence on April 1, 1970. However, all of them, except Jonna, listed Kodiak as the place where they resided for an aggregate of 10 or more years. Jonna listed Woody Island as the place where she resided for an aggregate of 10 or more years and for two or more years on April 1, 1970. Betty and Nettie listed Anchorage as the place where they resided for two or more years on April 1, 1970, and the rest listed Kodiak as the place where they resided for two or more years on April 1, 1970.

Walda stated that her parents considered Woody Island to be home. Edward stated that his mother talked of wanting to move to Woody Island. He also said that he would love to live on Woody Island. Neither of them knew why their parents never lived on Woody Island as adults.

Each of the identical affidavits submitted with Leisnoi's application states that the affiant lived on Woody Island for periods of time each year where "my residence consists of a 5 room house \* \* \*." Contrary to the content thereof, Mary Chya admitted that neither she nor her husband or children had a house on Woody Island or lived there for periods of time each year (except her husband as a child). In fact, according to Mary, they lived in Kodiak and stayed overnight on Woody Island only two or three times over the many years they visited

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there.

According to Mr. Feichtinger, they "frequented Woody Island to visit and engage in traditional and subsistence activities," including "visit[ing] [Woody Island with those children still living with Mary and John] throughout 1970 on a regular basis." Mr. Feichtinger based his statements upon the deposition testimony of Mary.

Mary did testify that they visited Woody Island in 1970, but did not state that they went there regularly or otherwise identify the frequency of their visit(s). Michael remembered going to Woody Island only a couple of times around 1967 or 1968 with relatives other than his parents.

Three of the older children, Nettie, Jonna, and Walda, stated that they never lived or spent the night on Woody Island. Nettie stated she and her husband and two older children visited Woody Island during the decade ending in 1970 to beachcomb, picnic, and look around. Jonna indicated that the Chya family would take the ferry to visit Woody Island during that decade and would then walk around and pick berries. She did not have strong memories of Woody Island, suggesting that their visits were neither frequent nor of great significance. Walda remembered picnicking, playing, and picking berries there with her parents and siblings.

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As an adult, Walda and her children and husband at that time, Marvin Love, Sr., made weekend day-trips to Woody Island in the 1960's and 1970 when Marvin Sr. was off work. They picnicked and picked berries. Her husband also hunted rabbits.

Betty stated that she visited Woody Island with her parents as a child but only spent the night there a few times during slumber parties with a church group. She stated that she moved from Kodiak to Anchorage in the late 1960's and was not on Woody Island in 1970.

None of the older children (Betty, Nettie, Norma, Jonna, Virginia), except Walda, are listed in the Feichtinger Report as a 1960's resident or 1970 resident of Woody Island. Walda and her four children, are listed as 1970 residents. Numerous witnesses identified the Chya family as residents of Kodiak. (Leisnoi's Answering Brief, p. 172; Tr. 248-54, 305-10, 420, 968-70, 1006, 1355, 2033, 2071; Exs. BIA-2A, pp. 117-115, 114-11, 101-87, 84-82; BIA-2B, pp. 146, 138, 117-16, 109-08, 36-35, 25, 20; L-DOC-33, -130, -137, -181, -322, -365; S-6N; L-CHART-4; Armstrong Depo., p. 43).

Virginia, John Jr., Michael, Nova, Edward, and Tamera were all minors on April 1, 1970, and, therefore, the permanent residence of each of them shall be determined according to that of their

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parents. Similarly, Keith, Randy, Marvin, and David were all minors on April 1, 1970, and therefore the permanent residence of each of them shall be determined according to that of their parents.

The facts show that no one in the family ever lived on Woody Island, except John during his childhood. They simply made day-trips there, primarily for recreational purposes. There is no clear indication of how often they visited. There is no substantial evidence that Woody Island served as a significant source of subsistence foods or otherwise served as the center of their Native family life during the decade ending in 1970. The alleged Village was not the permanent residence of any of them on April 1, 1970, and none of them lived there for a period of time in 1970.

### REDICK FAMILY

74. Marie Redick Unger (res: 1970)
75. Larry T. Redick (res: 1970)
76. William W. Redick (res: 1970)
77. Robert J. Redick (res: 1970)
78. David W. Redick (res: 1970)

Larry, William, Robert, and David, born in February 23, 1960, April 6, 1952, April 5, 1953, and March 21, 1954, respectively, are the children of Marie and her non-Native husband. Marie's

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deposition taken in 1978 and unsworn interviews of Larry, William, and David conducted in 1998 were introduced into evidence. No statement from Robert was introduced.

Marie and her children, except David, are enrolled to Woody Island and listed Woody Island as their place of permanent residence on April 1, 1970, but listed Kodiak as the place where they resided for two or more years on April 1, 1970, and for an aggregate of 10 or more years. Marie originally enrolled to the Natives of Kodiak but switched to Woody Island when she found out she could enroll to a village where she had ancestral ties. David enrolled to the Natives of Kodiak.

Marie's great grandfather was Nikolai Litnik, who lived with his children and some of his grandchildren on Woody Island around 1920. Marie lived for periods of time in the summer on Woody Island with her mother until Marie was 12 or 13 years old (1944 or 1945).

At all other times she has lived in Kodiak. She, her husband, and her children have lived in Kodiak to be close to employment and activities for the children. Marie testified in 1978 that she felt she belonged on Woody Island and that she planned to return to Woody Island when her kids were grown. She stated that the closing of the FAA school on Woody Island was not the reason why she

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had not yet returned.

She further testified that she and her family traveled to Woody Island every summer during the decade ending in 1970 for a week or two at a time, that they stayed in the Simeonoff house and she weeded the garden there, and that they fished, picked berries, cut trees for fuel, beachcombed, and picnicked there. She qualified that David did not go with them in 1970 and that they stayed for one week in 1970. Mr. Feichtinger characterized the week stay as a "considerable amount of time" spent on Woody Island in 1970.

Marie's testimony is somewhat at odds with the statements of her children. David stated that they did not go to Woody Island frequently, but, rather, "a couple of times" to picnic, and that he does not remember staying overnight. Larry similarly stated that they went there on a "few occasions" but that he did not spend the night there until the 1970's and that he did not want to move there. Likewise, William said that they had a "few" picnics there in the early 1960's, that he did not spend the night before 1970, that he could not remember if he was there in 1970, and that his mother had never indicated to him that she would like to live on Woody Island. (Leisnoi's Answering Brief, p. 172; Tr. 248-54, 305-10, 420, 943, 1007, 2033, 2810; Exs. BIA-2B, pp. 109-08, 20-19; L-DOC-329, -330, -332; S-6L; Armstrong Depo., pp.

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69-70).

While the Redick's clearly spent some time on Woody Island during the decade ending in 1970, including 1970, as confirmed by Christina Hoen, Esther Denato, and others, their use was mostly recreational and not frequent or extensive. The center of their Native family life was Kodiak, where they resided and where there were activities for the children and employment opportunities. Woody Island, by Marie's own admission, was not the place where she intended to return to live in 1970 but a place to go after her children were grown. Consequently, Woody Island was not her permanent residence during the 1960's or on April 1, 1970. The same holds true for her children, as they were all minors on April 1, 1970, and therefore their residency is established according to that of their mother.

According to Marie, she, Larry, William, and Robert stayed in the alleged Village for approximately one week in 1970 for recreational and subsistence purposes. The children have little or no memory of this week-long stay. It is questionable whether this week-long stay qualifies them as enrollees who lived for a period of time in the alleged Village in 1970.

**ROBERTSON FAMILY:** John "Jack" R. Robertson had a homestead site on Woody Island that he

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never perfected prior to his disappearance in the 1930's (L-DOC-334; Tr. 1699, 1702-04, 1745-46). His son, William J. Robertson, Sr., married Myra Malutin.

79. Myra Malutin (dec'd: 1982 or 1983; res: 1970)
80. William Robertson, Jr. (res: 1970)
81. Bruce Robertson (res: 1970)

William J. Robertson, Sr., and Myra Malutin are the parents of William Robertson, Jr., who is the father of Bruce Robertson, born November 14, 1953. Myra apparently lived and worked on Woody Island prior to World War II. Thereafter, she lived in Kodiak but spent "a lot" of time on Woody Island, according to her son William Jr. She visited Woody Island at least once in 1970, according to Yule Chaffin's diary. No statement or testimony from her was introduced into evidence.

William Jr. owned a home in Kodiak City where he and his family lived from 1952 through 1974. From 1960 through 1970, Kodiak was listed as his residence on his driver's license and voter registration card. He attended church there and considered it his home in 1970.

He earned a living by working for the U.S. Navy and the U.S. Coast Guard in Kodiak for 24 years and by commercial fishing. During the 1960's, his wife worked for Sears Roebuck & Company in

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Kodiak.

William Jr. and his family have never owned or lived in a structure on Woody Island. He tried unsuccessfully to acquire land on Woody Island: namely, the former homestead site of his grandfather, Jack Robertson, and the Chabitnoy property. He did not think of Woody Island as his home but as "a place that we would like to have a homesite or a place to retire to, a summer home or whatever." When he retired from the Coast Guard in 1974, they moved to Tacoma, Washington, but he has returned to the Kodiak area each summer to fish.

Bruce testified that his father "frequented" Woody Island in 1970. At the time he considered Woody Island to be his "home away from home." That year he and his dad made 15 to 20 or more daytrips to the island in their boat to fish, swim, hunt rabbits, and beachcomb. He also went there with "the Sundberg boys." He could not remember if they ever stayed overnight. They also camped and recreated elsewhere. Bruce has been married twice and neither of his two wives nor his two children have ever visited Woody Island.

Consistent with Bruce's testimony, his father testified that they have visited but never lived on Woody Island nor stayed overnight there from 1960 through 1970. He characterized Woody Island as

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their primary picnicking and beachcombing area when they lived in Kodiak. He likened their visits there to going to a park.

When the old FAA housing was being renovated by Leisnoi in the mid-1970's, Karl Armstrong asked Bruce if he was interested in living there. Bruce testified that he replied he had no interest because there were no employment opportunities there.

Myra was not enrolled to Woody Island. William and Bruce first applied to enroll to Ouzinkie but are now enrolled to Woody Island. Each of the two listed Woody Island as his permanent residence on April 1, 1970, but listed Kodiak as the place where he resided for two or more years on April 1, 1970, and as the place where he resided for an aggregate of 10 or more years. (Leisnoi's Answering Brief, p. 172; Tr. 246, 948-49, 1002, 1695-97, 1704-08, 1710-25, 1736, 1745-49, 1752-57, 1761, 1767-68; Ex. L-CHART-8; BIA-2B, pp. 104, 18)

The evidence of Myra's use of Woody Island after World War II is limited to one visit in 1970 and her son's vague statement that she spent "a lot" of time on Woody Island. None of the multitude of witnesses identified her as one of the few Natives who used or occupied Woody Island with any frequency or consistency in the late 1960's or 1970.

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She was not a permanent resident of the alleged Village and did not live there for a period of time in 1970.

Because Bruce was a minor on April 1, 1970, his permanent residence shall be determined according to that of his parents. His father, William Jr., established long-term employment and residency in Kodiak and never lived or stayed overnight on Woody Island. He viewed Woody Island as a "park" where they could picnic and beachcomb and as a place where he would like to retire or have a summer home. He was not a permanent resident of the alleged Village on April 1, 1970, and therefore neither was his minor son Bruce. Neither of them lived for a period of time in the alleged Village in 1970, but merely recreated there on day-trips.

### WARD FAMILY

82. Kyra Ward (res: 1970)
83. Edward Ward (res: 1970)

Edward was born January 30, 1953, and Kyra was born June 22, 1955, to Harold and Betty Ward. Edward, Kyra, their siblings, and father are Woody Island enrollees, yet Edward testified that none of them ever lived on Woody Island. Betty is not enrolled to Woody Island. Except for the testimony of Edward, no statement or testimony

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from any of the Wards was introduced into evidence.

Harold and Betty were close friends with Bill and Zelma Stone. Zelma confirmed that the none of the Wards ever lived on Woody Island and she never saw any of them there.

The Ward family moved from the State of Washington to Kodiak in September 1965. His parents moved to Anchorage in 1977 and now live in Wasilla, Alaska. Edward moved to Homer, Alaska in the late 1980's.

The Family List shows that Harold, Edward, and Kyra all listed Woody Island as their permanent residence on April 1, 1970, Kodiak as the place where they resided for two or more years on April 1, 1970, and Sitka as the place where they resided for an aggregate of 10 or more years. Thus, apparently, the family lived in Sitka before they lived in Washington.

Edward testified that his father had ancestral ties to Woody Island, although those ties were never clearly identified. At the time they enrolled, Edward did not know much about his father's history and ancestry, so he questioned him about them. He testified that he had to "pry[] the history out of my father on his ancestry and the tranquility of [Woody Island]." At that time they had lengthy

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discussions regarding where to enroll. His father's expressed "concern was being back where his roots were. \* \* \* All he ever talked about was being able to get back to Woody Island."

Edward testified that, as of 1970, the family's home was in Kodiak, where they lived, went to school, attended church, and received their mail and where his parents were registered to vote and licensed to drive. From 1969 to 1971 Edward visited Woody Island a couple of dozen times with friends to avoid chores at home, hunt rabbits, harass the cattle, and otherwise recreate. Kyra also visited the island with him or her friends. Most of his visits were day-trips. His longest stay was two nights and three days.

Edward is now the CEO and President of Leisnoi. (Tr. 417, 419, 426, 463-64, 1000-01, 2454-57, 2461-68, 2476, 2490, 2496-98, 2506-29; Ex. BIA-2B, pp. 105, 11-10).

Because Edward and Kyra were both minors on April 1, 1970, their permanent residence shall be determined according to that of their parents. Their father is the only parent with any ties to Woody Island and those ties were never clearly defined. What is clear is that he never lived there and that there is no evidence that he even visited there. Neither parent's permanent residence was the alleged Village on April 1, 1970, and therefore the

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permanent residence of Kyra and Edward was not the alleged Village on April 1, 1970.

Further, Kyra and Edward did not live for a period of time on Woody Island, let alone the alleged Village, in 1970. They merely recreated there with friends, primarily on daytrips.

### OTHERS

#### 84. Marty Charles Shuravloff (res: 1970)

He was born in 1953 to Martha and Nick Shuravloff. His maternal grandparents lived on Woody Island. His mother also lived there, both in the Baptist Mission and in her own home. She moved to Kodiak in the early 1940's. Marty's father has never lived on Woody Island. While his parents sometimes took the family to Woody Island for picnics, they have lived in their own home in Kodiak since the mid-1940's. Nevertheless, they are enrolled to Woody Island, listing it as their permanent residence on April 1, 1970, but listing Kodiak as the place where they resided for two or more years on April 1, 1970, and for an aggregate of 10 or more years.

Marty testified at the hearing and an unsworn interview of him was also introduced into evidence. No statement or testimony from his parents was introduced.

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Marty lived in Kodiak with his parents up through the decade ending in 1970. As an adolescent in the 1960's, he traveled with friends to Woody Island and other islands to hunt, fish, and "fool around". They viewed Woody Island as their "playground". Mr. Feichtinger indicated that Marty spent a "considerable amount of time" there in 1970, but Marty was not sure whether he spent any time there in 1970.

In the mid-1970's, Marty became the general manager of Leisnoi's project to renovate the FAA housing on the east side of Woody Island. During the renovation he and his wife and children lived in that housing for 4-6 months before moving back to Kodiak. Except for those months and a period when he attended college, he has lived in Kodiak all his life.

He is enrolled to Woody Island. He listed Woody Island as his permanent residence on April 1, 1970, but listed Kodiak as the place where he resided for two or more years on April 1, 1970, and as the place where he resided for an aggregate of 10 or more years. (Tr. 248-54, 420, 941, 948, 1007-08, 2034, 2095, 3151-68; Exs. L-CHART-7; BIA-2B, pp. 115, 16).

Because Marty was a minor on April 1, 1970, his permanent residence shall be determined according to that of his parents. Their permanent

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residence, and consequently Marty's permanent residence, throughout the decade ending in 1970 was Kodiak, not the alleged Village.

Also, Marty did not live for a period of time in the alleged Village in 1970. He was not sure if he visited there in 1970, and Woody Island was simply one of several "playgrounds" visited by himself and his friends.

### 85. Charles C. Naughton (dec'd: 1997; res: 1970)

He testified via deposition taken in 1978. He first enrolled to the Natives of Kodiak and then applied to change his enrollment to Woody Island. He believed that he could have chosen to enroll anywhere in Alaska, but chose Woody Island because he had been there, felt he belonged there, knew and respected the people enrolling there, and was attracted by the potential long-term economic benefits.

He testified that he is enrolled to Leisnoi, but he is not listed on the certified Native Roll for Woody Island. He listed Woody Island as his permanent residence on April 1, 1970, but listed Kodiak as the place where he resided for two or more years on April 1, 1970, and as the place where he resided for an aggregate of 10 or more years. He was born in 1947.

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His ancestors are from Katalla in southeast Alaska. He has no ancestral ties to Woody Island. However, he did grow up in Kodiak and on Woody Island. He had relatives, Janet and Pappy Lee, who lived in the FAA housing on Woody Island prior to the 1964 earthquake. He stayed with them summers and some winters until approximately 1961.

Thereafter, he has not lived on Woody Island but has visited the island, staying no more than a week or two at a time. His uncles, Harold and Edward Naughton, confirmed that he lived in Kodiak, not on Woody Island, during the 1960's, and that he sometimes camped on Woody Island. He would stay in his boat, in a dilapidated cabin near Sawmill Point, or in the Chabitnoy house. He testified that he visited the island once a week or twice a month in the summertime, but it is not clear whether he was referring to the years after or before 1970 or both.

By 1970 he was approximately 20 years old and had entered college in the State of Washington. In the summers, he commercially fished in Anton Larsen Bay and fished for subsistence purposes off of Woody Island. He also hunted rabbits there. Karl Armstrong testified that Charles probably was on Woody Island in 1970, whereas Paul Harmon did not see Charles there in 1970. One year Charles took time off from college to work as a truck driver

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and he was not sure if that year was 1970.

By 1978 he was living and working in Anchorage, but visited Kodiak and Woody Island "frequently". He also owned a home in Kodiak which he rented to others. When in Kodiak, he would sleep on his boat.

He stated that he would build a home on Woody Island if not for the likelihood of vandalism. He lamented the fact that no one was living there to discourage vandals. (Exs. BIA-2B, p. 119; L-DOC-385, p. 7,014; S-6J, pp. 3-9, 11-12, 16, 18-20, 22-29; Armstrong Depo., pp. 41, 46, 57-58, 114; Tr. 243-44, 265, 303, 467, 1008-09, 1683-85).

Charles did not live on Woody Island after 1961. The frequency of his visits to Woody Island during the 1960's and 1970 is unclear. He never stayed more than a week or two at a time. A significant portion of his time at Woody Island was spent outside the alleged Village and his ties or connections were not to the alleged Village but to the island generally, particularly the east side. He neither owned nor maintained any structure in the alleged Village. He was not a permanent resident of the alleged Village on April 1, 1970.

Nor can he be considered an enrollee who lived for a period of time in the alleged Village in 1970, as he is not listed as an enrollee of the alleged

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Village on the certified Native Roll.

86. George Hansen (res: 1970)

He was born on March 19, 1952. He is enrolled to Woody Island. He listed Woody Island as his permanent residence on April 1, 1970, but listed Kodiak as the place where he resided for two or more years on April 1, 1970, and Seward as the place where he resided for an aggregate of 10 or more years and the place where he was born.

His parents lived in Seward from the 1940's until they moved the family to Kodiak in 1963. They never lived on Woody Island but recreated there, picnicking, beachcombing, and fishing. They moved back to Seward in 1976. His mother and the rest of his family enrolled to Shungnak.

George lived with his parents until sometime in 1970 when he took up separate residency in Kodiak. That year he also graduated from high school. During his high school years, including 1970, he recreated on Woody Island and other islands during the summer, beachcombing, playing, picnicking, fishing, and "goofing around." George testified at the hearing that he loved Woody Island and that he would like to live there if economics would permit it, but he continued to live in Kodiak up through the date of hearing. (Tr. 248-54, 423, 1009-10, 3171-85; Exs. BIA-2B, p. 31; L-DOC-385,

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p. 7,003).

George reached majority only 12 days before April 1, 1970. It is unclear whether he moved out of his parents home in Kodiak before or after he reached the age of majority, but it is clear that he continued residing in Kodiak.

His and his parents' only Woody Island ties and activities are recreational. Even the frequency of their mere recreational use was not specified, except by Mr. Feichtinger without supporting evidence. Several witnesses never saw George on Woody Island in 1970 or any other time. The alleged Village neither served as their home or the center of their Native family life at any time.

In sum, the alleged Village was not George's permanent residence, whether determined according to his parents' permanent residence (either Kodiak, Seward, or Shungnak) or otherwise. Nor did the vague testimony of "goofing around" on Woody Island establish that George lived in the alleged Village for a period of time in 1970.

### 87. Anna Kerr Blinn Bowers (res: 1970)

She was born in 1922 in Seldovia, Alaska. Her father is Mike Kerr, who moved his family to Kodiak in 1924. From that point forward Anna has resided in Kodiak, except for the year 1930, when

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she stayed at the Baptist Mission on Woody Island.

After her parents divorced, her father married Anna's stepmother, Grace Amuknuk, in approximately 1928. Grace was raised in the Woody Island Baptist Mission.

Anna married in 1942 and eventually had children. She and her family visited Woody Island "often" on day-trips to picnic, beachcomb, and pick berries during the decade ending in 1970, including two or three visits in 1970. The only time she stayed overnight was when she worked at Camp Woody prior to 1963.

During the 1960's Kodiak was the place where she was employed, registered to vote, and licensed to drive. She testified that she considered Kodiak to be her home, but that she would like to live on Woody Island if she had a chance.

She and many of her relatives are enrolled to Woody Island, although none of them lived there after 1940. She listed Woody Island as her permanent residence on April 1, 1970, and as the place where she resided for two or more years on April 1, 1970, but listed Kodiak as the place where she resided for an aggregate of 10 or more years. (Exs. L-DOC-51, -108, tab 4, p. 17; BIA-2B, p. 73; Tr. 248-54, 305-10, 423, 1009, 3211-29, 3233, 3245-48, 3250-51).

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The evidence shows that Anna's home and permanent residence on April 1, 1970, was Kodiak, not the alleged Village, and that she did not live in the alleged Village for a period of time in 1970. Her testimony that she visited Woody Island "often" is vague. In 1970, she visited for only two or three daytrips, which is less than "often." Several witnesses never saw her on Woody Island and knew her to be a resident of Kodiak. She did not stay overnight and her use was primarily, if not wholly, recreational.

### 88. Georgi Nekeferoff (dec'd; res: 1960's, 1970)

Little is known about Georgi's life prior to World War II. Derivations of his family name, Nekeferoff, are found on early census records of Woody Island and the records of the Baptist Mission. Several Nekeferoff's are listed as attending the Longwood School on Woody Island during the 1930's.

Georgi, now deceased, never married and had no children. He did not enroll to Woody Island. No statements or testimony from him were introduced into evidence.

During the decade ending in 1970, the Nekeferoff family residence was in Kodiak and Georgi lived primarily in the Kodiak jail because of his alcoholism. He was kept there more for his own

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protection than as punishment. He cooked and served as a trustee at the jail. He had a "special" room there and a "special" arrangement with the Kodiak Police Chief. There is even evidence that the Police Chief may have been Georgi's legal guardian, managing his funds so that Georgi would not spend them all on alcohol.

Georgi also spent time on Woody Island when he was not in jail. He lived at times in an old cabin on the Garden Beach area of Woody Island. That cabin was dilapidated by the mid-1960's and had collapsed by 1970. There is conflicting, uncertain, and vague testimony as to whether he was alive in 1970 and whether, how, and when he used Woody Island in the 1960's and 1970. (Tr. 248-54, 305-10, 423, 1009, 1469-70, 1597-98, 1980-83, 2809-10, 2879-80; Exs. L-J-C-129, -173, -174, -176, -420)

The evidence does not establish that Georgi was a permanent resident of Woody Island on April 1, 1970. There is no subjective evidence of his intent to return there. The objective evidence shows that he spent the vast majority of his time living in Kodiak. His ties to Woody Island and use thereof during the decade ending in 1970 are vague and uncertain. By 1970 the Garden Beach cabin had collapsed and the jail and family residence were in Kodiak.

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89. Karl Armstrong, Jr. (dec'd: 1983; res: 1960's, 1970)

Karl was born in 1927 to Afanasiia Rysev, daughter of Sophia Pestrikov and Vasilli Rysev, all of whom lived on Woody Island. Karl and his mother left Woody Island in 1928. He testified via deposition that he did not return to live on Woody Island until 1957 or 1958. In the meantime, he lived and worked for newspapers in Kodiak and Anchorage. In 1957 he moved back to Kodiak from Anchorage and unsuccessfully attempted to acquire land, first in Kodiak and then on Near Island, under the Native Allotment Act.

During the decade ending in 1970, he resided and was employed in Kodiak. His primary occupation was writing for and managing the local newspaper. Several witnesses testified that Karl lived in Kodiak, not Woody Island, and/or that they had never seen him on Woody Island.

He stated that he lived on Woody Island for 3 months in the summer of 1957 or 1958, off and on for a total of approximately 60 days in 1968, and non-winter weekends totaling approximately 35 days per year from 1969 to 1972. From 1968 to 1972, he did not stay for more than 5 days at one time. He did not own property there, but stayed primarily in the Simeonoff house and assisted in

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maintaining the garden there. He falsely or misleadingly indicated in an affidavit submitted with Leisnoi's application that he lived there since 1963 and that a house (the Simeonoff house) was his house. After 1972 he did not spend much time on Woody Island.

Charles Naughton confirmed that Karl did visit Woody Island and Christina Hoen acknowledged that she gave Karl permission to use the Simeonoff house. His primary activities on Woody Island were writing for the newspaper and recreating. He also stated that he hunted rabbit for subsistence purposes, but Charles Naughton testified that Karl merely walked with him when hunting rabbits and preferred to sit on the beach.

Karl is enrolled to Woody Island. He testified that he regarded Woody Island as his "home," but the Family List shows that he listed Kodiak as his permanent residence on April 1, 1970, as the place where he resided for two or more years on April 1, 1970, and as the place where he resided for an aggregate of 10 or more years. (Tr. 296, 300, 422, 467, 946, 1009, 2034; Exs. BIA-2B, p. 146; S-6A, p. 33; S-6B, p. 17; S-6F, p. 53; S-6J, pp. 5, 30-31, 40; Armstrong Depo.).

From 1928 to 1967 Karl rarely ventured to Woody Island and it clearly was not the center of his Native family life. He established long-term

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employment and residency in Anchorage and Kodiak. While he began visiting the island more regularly during the 1968 to 1972 period, Karl never relied upon Woody Island for subsistence purposes. He recreated and wrote to sustain his newspaper business in Kodiak. For many decades up through 1970 the center of his Native family life was Kodiak where he had long been part of the modern cash economy. He was not a permanent resident of the alleged Village on April 1, 1970.

However, his use of the alleged Village for multiple weekends totaling approximately 35 days in 1970 arguably qualifies him as an enrollee who lived there for a period of time in 1970.

### 90. Roy Madsen

Testimony, affidavits, and an unsworn interview of him were introduced into evidence. He was born in Kanatak, Alaska, in 1923. In approximately 1927, his family moved to Kodiak. Thereafter, he has resided in Kodiak, except for approximately 15 years during which he attended college, served in the military, and practiced law in Oregon. By approximately 1961 he had returned to Kodiak and eventually became a Superior Court Judge in Alaska.

As a child, he visited his sister and cousins who were being raised at the Baptist Mission

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orphanage on Woody Island. He began visiting the island again in 1966 when he acquired a boat so that he was able to travel to the island. He made several day-trips there in 1970 to pick berries and fish. In 1970, he was living with his wife and children in Kodiak, where he practiced law and was a member of KANA, the Rotary Club, the Navy League, and the Elks Lodge.

During his childhood he also spent time with his aunt in Karluk. As an adolescent he spent summers with his father, a big game hunting guide, in Uganik and Eyak Bay. In 1961 he bought property in Kashuryak Bay, where Port Lions is now located. He had ancestors from Ninilchik and from Afognak.

Based upon his ties and connections to many places, he believed that he could have enrolled to any one of approximately ten Native villages. He testified that the location of his permanent place of abode intended by him to be his actual home in 1970 was Kodiak. He further stated that the center of his Native family life to which he had the intent to return when absent from that place in 1970 could have been Woody Island, Karluk, Port Lions, Uganik, Eyak, or any of several other places. He thought that any of them could have qualified as his permanent resident up until the date upon which he enrolled and chose Woody Island. However, he first enrolled to Natives of Kodiak but later changed

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his enrollment to Woody Island.

The Family List indicates that he listed Woody Island as his permanent residence on April 1, 1970, but listed Kodiak as the place where he resided for two or more years on April 1, 1970, and for an aggregate of 10 or more years. He is not listed in the Feichtinger Report as either a 1960's resident or a 1970 resident of Woody Island.

In the mid-1970's he began the process of acquiring the property upon which the Fadaoff/Madsen house is located. Once he acquired it, he spent the entire month of August on Woody Island for several years. (Exs. L-DOC-172, -173, -174, BIA-2B, p. 118; Tr. 2862-80, 2884-87, 2909-12, 2917, 2925)

The evidence does not show that he frequently or consistently used Woody Island during the decade ending in 1970. He did not state how often or how long he visited Woody Island other than mentioning several day-trips in 1970. Some childhood visits to the island and several day-trips 35 years later do not make the alleged Village the center of his Native family life.

Kodiak was his "home" and the place to which he initially enrolled. He had ties to many places but always returned to Kodiak. The evidence shows that Kodiak, and not the alleged Village, was his

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permanent residence as of April 1, 1970. Further, he did not live for a period of time in the alleged Village in 1970.

### 91. Fred Zharoff

He is not listed as a 1960's resident or a 1970 resident in the Feichtinger Report. He is enrolled to Woody Island. When he enrolled to Woody Island, he understood that he could enroll to any place where he wanted to live or where he had roots.

He listed Woody Island as his permanent residence on April 1, 1970, but listed Kodiak as the place where he resided for two or more years on April 1, 1970, and for an aggregate of 10 or more years. Statements from him were introduced via live testimony, affidavit, and unsworn interview.

He was born in 1944 and raised in Kodiak. His family owned a home in Kodiak. Except for periods of college attendance or service in the military or the State legislature, both he and his parents have lived in Kodiak all their lives.

Beginning in the early 1960's, he and his friends, both Native and non-Native, began frequenting Woody Island for recreational purposes, including camping, hiking, picking berries, and hunting rabbits. They also engaged in subsistence activities, including cutting firewood, hunting seals

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and ducks, and fishing. In 1970, he went there with his wife on one occasion to hunt rabbits. He thought "that if [he] ever got a chance to live permanently on Woody Island [he] would like to do so."

In approximately 1977 he, his wife, and children moved to the newly renovated housing at the old FAA site and stayed for six to eight months. They moved back to Kodiak for better access to schools and employment, as it was not safe to commute to Kodiak.

He has served on Leisnoi's Board of Directors. He referred to both the Kodiak Archipelago and Woody Island as "home." (Exs. BIA-2B, p. 115; L-DOC-437, -438; Tr. 3083-84, 3086-88, 3092-96, 31005-06, 3112-14)

Up through 1970, he had never lived on Woody Island but had only resided in Kodiak. His use of Woody Island was primarily recreational with adolescent friends. His only referenced use as a married adult up to that time was a single visit to hunt rabbit. This evidence shows that Kodiak, and not the alleged Village, was his permanent residence on April 1, 1970, and that he did not live for a period of time in the alleged Village in 1970.

### 92. Dorothy Bactad

She is not listed as a 1960's resident or 1970

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resident of the alleged Village in the Feichtinger Report. Nor did Koniag list her as a 1970 permanent resident. The only statement from her introduced into evidence is a 1996 unsworn interview of her.

She is enrolled to Woody Island. The Family List shows that she listed Woody Island as her permanent residence on April 1, 1970, but listed Seattle, Washington, as her address and the place where she resided for two or more years on April 1, 1970, and Kodiak as the place where she resided for an aggregate of 10 or more years.

She was raised in the Woody Island Baptist Mission from 1924 to 1936. She left Woody Island in 1936 and never returned. She stated that she reminisces about the island and would love to go back there. (Exs. L-DOC-46; BIA-2B, p. 88)

She clearly was not a permanent resident of the alleged Village on April 1, 1970, and did not live there for a period of time in 1970. She has not set foot on Woody Island since 1936. This objective evidence outweighs her general statement that she "would love to go back there." Her statement, in light of the evidence, does not show that in 1970 she had an intent to return there or was a permanent resident.

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### 93. Sara Chokwak

She is not listed as a 1960's resident or 1970 resident of the alleged Village in the Feichtinger Report. Nor did Koniag list her as a 1970 permanent resident. The only statement from her introduced into evidence is a 1996 unsworn interview of her.

She is enrolled to Woody Island. The Family List shows that she listed Woody Island as her permanent residence on April 1, 1970, but listed Kodiak as the place where she resided for two or more years on April 1, 1970, and Old Harbor as the place where she resided for an aggregate of 10 or more years.

She was born into the Lowell family in 1929 on Woody Island. She lived there until she was 9 years old. In 1938, she moved to Old Harbor and was still living in Old Harbor at the time of the 1964 earthquake. Up through 1970 she returned to Woody Island only twice, once in 1950 and once in 1966 to cook at Camp Woody. Referring to the 1950 visit, she wished she could have stayed there more. She also visited there in the summer of 1996. (Exs. L-DOC-87; BIA-2B, p. 119)

The evidence does not show that she was a permanent resident of the alleged Village on April 1, 1970, or that she lived there for a period of time

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in 1970. She visited only twice in the 32 years from 1938 to 1970. This does not show that she intended to return in 1970 or that the alleged village was the center of her Native family life.

### 94. Neil Sargent

He is not listed as a 1960's resident or 1970 resident of the alleged Village in the Feichtinger Report. Nor did Koniag list him as a 1970 permanent resident. The only statement from him introduced into evidence is a 1998 unsworn interview of him.

He is enrolled to Woody Island. The Family List shows that he listed Woody Island as his permanent residence on April 1, 1970, but did not identify the place where he resided for two or more years on April 1, 1970, and listed Kodiak as the place where he resided for an aggregate of 10 or more years. By 1972 he was living in New York.

His parents were born and lived their whole lives in Kodiak. He, too, was born and lived most of his live in Kodiak. He was born in approximately 1920. When he was a child, his mother took him to Woody Island to attend the Russian Orthodox Church. The only other times he was on Woody Island were in 1961, when he assisted in rebuilding the dock there, and sometime around 1970, when he merely set foot on the beach. (Exs. L-DOC-340;

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BIA-2B, p. 80; L-DOC-161, p. 280)

The record does not show that his permanent residence was the alleged Village on April 1, 1970, or that he lived there for a period of time in 1970. His ties and visits to Woody Island have been minimal. There is no evidence that the alleged Village was the center of his Native family life, that he ever lived there, or that he intended it to be his home.

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Protestant clearly met his burden of proving that the alleged Village did not have 25 or more Native permanent residents on April 1, 1970. Other than Johnny Maliknak and Nicholas Pavloff, who were certainly permanent residents, there are only a few more Natives (such as Christina Hoen and her children) who even came close to meeting the standard of permanent residency. The record shows that there were far less than 25 Native permanent residents of the alleged Village on April 1, 1970.

Protestant also proved by a preponderance of the evidence that the alleged Village did not meet the requirement that at least 13 enrollees to the alleged Village must have used it during 1970 as a place where they actually lived for a period of time. Those enrollees who certainly lived in the alleged Village for a period of time in 1970 are Johnny Maliknak and Nicholas Pavloff, Karl Armstrong,

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Rudy Sundberg Jr., Christina Hoen, Cien Weeks Hoen, and Chrislyn Hoen are enrollees who qualify more likely than not. The only other enrollees who come close to qualifying are Marie Redick Unger and three of her children, Larry, William, and Robert, who stayed there for a one week-long visit. Assuming, arguendo, that they qualify, there are, at most, 11 enrollees who lived for a period of time in the alleged Village in 1970.

### **3.**

#### **Was the "act of God" proviso invoked?**

Respondents argue that any failure to meet the subsection 2651.2(b)(2) occupancy requirement of at least 13 enrollees having used the alleged Village during 1970 as a place where they actually lived for a period of time was excused under the "act of God" proviso by the following events: (1) the 1964 earthquake and tidal wave, (2) the closing of the school on Woody Island in 1969, (3) the FAA's 1963 restrictions on ferry usage, (4) the Borough's imposition of taxes on real property on Woody Island, beginning in the mid- to late-1960's, and (5) the Vietnam War. As previously mentioned, subsection 2651.2(b)(2) contains and is subject to the "act of God" proviso. Under that proviso, the occupancy requirement is excused if an act of God or government authority within the 10 years preceding April 1, 1970, results in the temporary unoccupancy

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of a traditional village. Natives of Afognak, Inc., supra, at 21-23.<sup>3</sup>

Respondents argue that Protestant has the burden of proving not only that a state of unoccupancy existed, but also that such unoccupancy was not "temporary" within the meaning of the proviso or that there is no causal connection between the fact that an act of God or government authority occurred, and the fact that the village was subsequently unoccupied in 1970. See Natives of Afognak, Inc., supra, at 21-22. However, his burden to show that any state of unoccupancy was not "temporary" or causally connected to an act of God or government authority is dependent upon whether the "act of God" proviso was invoked. See id.; Village of Kaguyak, supra, at 29.

Resolution of the issue of whether the proviso was invoked also effects evaluation of the issue of whether the alleged Village satisfies the requirement of 43 C.F.R. § 2651.2(b)(1), which provides that the alleged Village must have had 25

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<sup>3</sup>The proviso does not excuse the requirement that the alleged Village must have had 25 or more Native residents as of April 1, 1970, Bureau of Sports Fisheries & Wildlife v. Village of Kaguyak, ANCAB VE 74-9 (June 10, 1974) at 31, nor does it excuse the requirement that the alleged Village must have an identifiable location. Village of Litnik, supra, at 4.

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or more Native residents as of April 1, 1970. As previously mentioned, if the "act of God" proviso excuses the occupancy requirement, it would be very difficult for Protestant to prove that there were not 25 Native residents. See, e.g., Natives of Afognak, Inc., supra, at 23.

The "act of God" proviso may be invoked either in the eligibility Determination or by a prima facie showing at the hearing of the elements necessary for its invocation. See id. Leisnoi argues that the proviso was invoked in the Area Director's eligibility Determination based upon two facts.

First, Mr. Fitzpatrick's report identifies the 1964 earthquake and tidal wave and removal of the school and FAA presence in 1969 as acts of God or government authority. Second, the Area Director found in the alleged Village's Certificate of Eligibility that it "complies with the criteria set forth in 43 CFR 2651.2(b)(2)." From these facts, Leisnoi concludes that the Area Director relied upon that portion of Mr. Fitzpatrick's report, that the reference to the criteria of subsection 2651.2(b)(2) pertains to the "act of God" proviso, and that the Area Director invoked that proviso.

Leisnoi's argument cannot be sustained. The Area Director never mentioned an act of God or government authority or the "act of God" proviso in the eligibility Determination or related findings of

## APPENDIX E-196

fact. Instead, he concurred with another portion of Mr. Fitzpatrick's report in which he concluded that the alleged Village met the occupancy requirement of at least 13 enrollees having used the alleged Village during 1970 as a place where they actually lived for a period of time. This finding obviated any need to invoke or even mention an act of God or the "act of God" proviso.

The fact that the Certificate cites compliance with subsection 2651.2(b)(2) is reasonably explained as a reference to compliance with the actual requirements contained therein: that the alleged Village have an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and life-style and that at least 13 enrollees thereto must have used the village during 1970 as a place where they actually lived for a period of time. This is precisely what the Area Director found in the eligibility Determination and related findings.

If he had meant to invoke the "act of God" provision, he presumably would have at least mentioned an act of God or government authority and the proviso in the eligibility Determination and related findings. If such were the case, one would expect the Area Director to state in the Determination, findings, and/or Certificate that compliance with the subsection 2651.2(b)(2) requirements is excused by an act of God or

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government authority rather than to find compliance with those requirements.

The eligibility Determination and related findings of fact did not invoke the "act of God" proviso. There was no need for its invocation because invocation is necessary only to excuse a temporary state of unoccupancy in 1970 and the Area Director found that the occupancy requirement had been met.

Because the Area Director did not invoke the "act of God" proviso in the eligibility Determination, the question then becomes whether the proviso was invoked by a *prima facie* showing at the hearing. ANCAB has held that the "act of God" proviso may be invoked not only in the eligibility Determination, but also by a *prima facie* showing that the alleged Village was known as a "traditional" village, that an act of God or government authority occurred within the 10 years preceding April 1, 1970, that the act of God or government authority caused unoccupancy of the village, and that this unoccupancy was "temporary" within the meaning of the proviso. See Village of Kaguyak, *supra*, at 29. The Respondents failed to make this showing.

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a.

### **Was the alleged Village known as a traditional village?**

While there is no dispute that a traditional village once existed on the west side of Woody Island, Protestant maintains that the village must have been, but was not, known as a traditional village at the time of the alleged acts of God or government authority. He argues that "traditional village" must be construed as meaning more than simply an "historic village" or any unoccupied place that once had been the site of a traditional village. According to Protestant, the requirement "known as a traditional village" must be construed as requiring, at the very least, that, at the time of such acts, the village must have had an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and life-style, must have constituted a "Native village" within the meaning of Section 3(c) of ANCSA, and must have been used by at least 13 enrollees as a place where they lived for a period of time. Respondents provided no arguments that directly respond to Protestant's contentions.

Protestant's contentions cannot be sustained. The alleged requirements are used to determine whether a village is eligible as of April 1, 1970. A place may be known as a traditional village yet not

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meet the eligibility standards for a period immediately preceding the acts of God or governmental authority.

Subsection 2651.2(b)(2), as originally proposed, stated, "The village must have been in existence as an established village on April 1, 1970, and separate and not connected with or a part of a city, town, or other identifiable community settlement." 38 Fed. Reg. 6504, 6508. The reasons for the change in the language are not published, but a reasonable guess can be made. Both the phrase "evidenced by occupancy consistent with the Natives' own cultural patterns and life style" and the phrase "known as a traditional village" appear to be substitute language for "separate and not connected with or a part of a city, town, or other identifiable community settlement." The apparent purpose of the language is to distinguish a community defined by Native cultural patterns and life-style from other communities.

A more basic question is whether it was actually known as a community or village at the time the alleged acts of God or governmental authority occurred. The nature and extent of occupancy or unoccupancy during the period preceding such acts may be such that a place is not known or is no longer known as "traditional" or as a "village".

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The evidence shows that the alleged Village was known as a traditional village at least until the end of World War II and that by the late-1960's it was no longer known as a village. Numerous witnesses and reports dealing with Native villages in the area did not recognize the alleged Village as a Native village by that time (see Subpart 4 of this Part below). Sometime between 1945 and the late-1960's the alleged Village ceased to be known as a village. That point in time is difficult to pinpoint.

The weight of the evidence shows that it was not known as a village in 1963 when the first alleged act of God or governmental authority occurred. The alleged Village is not mentioned in a Government report "to evaluate the extent and nature of damage to the communities on Kodiak Island and the islands nearby [caused by the 1964 earthquake]." (Ex. L-BOOK-80) The authors investigated the effects in May and July of 1964 and were clearly aware of the existence of Woody Island because the island is mentioned twice. The omission of the alleged Village strongly suggests that it was no longer known as a community or village. Respondents own witness, Bruce Robertson, testified that no village existed on Woody Island in 1959 or 1960 (Tr. 1725-26). Consequently, Respondents failed to make a showing that the alleged Village was known as a traditional village.

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b.

### **Did the occurrence of one or more acts of God or government authority between April 1, 1960 and April 1, 1970 cause a temporary unoccupancy of the village in 1970?**

Respondents also failed to make a showing that the occurrence of one or more acts of God or government authority during the 1960's caused the unoccupancy of the village in 1970 or that the unoccupancy was temporary. The beginnings of the depopulation of the island can be traced back at least as far as the Katmai eruption of 1912 and Spanish flu epidemic of 1918. From 1910 to 1920 the population, including Mission children, decreased from 168 to 104. In the 1920's the population stabilized before once again plummeting in the 1930's to 54 due, in large part, to the relocation of the Mission to Kodiak.

The lure of better opportunities for employment, schooling, medical services, and other amenities also contributed to the relocation of Woody Island's population to Kodiak and other places. With the initiation of construction of the Naval base near Kodiak in 1939, Kodiak experienced a boom in employment opportunities and amenities which attracted Woody Islanders there, especially with the closing of the Woody Island school in 1943. By 1944 Woody Island's population was down to 37.

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Long-time residents Ella Chabitnoy and Natalie Simeonoff both acknowledged the exodus from Woody Island preceding World War II. Natalie compared the exodus to the depopulation of rural areas in the Lower 48 States in that people gradually became less dependent on the land for subsistence, buying more and more of their food, and eventually moved to the cities to earn a living.

By 1950, the population had risen to 111, but this rise coincided with the influx of FAA personnel and their families. By the mid-1950's, there were 21 FAA families and only four Native families, including the Simeonoff's, Harmon's, and Chabitnoy's.

The Simeonoff's left in 1956 because Kelly Simeonoff, Sr. lost his job with the FAA on Woody Island. The Harmon's left in 1959, with most of them eventually moving to the State of Washington because Nettie's husband James Hartle got a better job there and the other family members followed them. The population was further decimated in the late-1950's by the occurrence of several tragedies, including the deaths of Mike Chabitnoy, Edison Fadaoff, Sr., Stephan Maliknak, Paul Wolkoff, and Nicolai Maliknak.

By 1960 there were, at most, 20 consistent residents of Woody Island, including Angeline Maliknak, Herman Ponchene, Nicholas Pavloff, Sr.,

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possibly Natalie Ponchene, possibly Johnny Ponchene, Mary Ponchene Pavloff, Edison Fadaoff, Jr., Joseph Fadaoff, Johnny Maliknak, William Wilfred Pavloff, Agnes Frump, Mary Anne King, Harold King, Brenda Pajurkin a.k.a. Frump, Ella Chabitnoy, Mickey Chabitnoy, Cecil Chabitnoy, possibly Buddy Fadaoff, and James Fadaoff. Additions to the population in the early 1960's included William Pavloff, born in 1961, and some of the Simeonoffs who returned for a year or two before leaving again before the 1964 earthquake.

By the time of the earthquake more subtractions had occurred. Agnes Frump had died and her children, Mary, Harold, and Brenda, went to live elsewhere, Ella and Cecil Chabitnoy had already relocated to Kodiak, and Buddy Fadaoff had relocated to the State of Washington. No one left the island as a result of the earthquake, but, rather, Christina Hoen and her family moved back for 8 months. Nettie, Ernie, and James Hartle also returned very briefly.

From 1965 to 1967 additional tragedies or infirmaries resulted in further losses of population: Angeline Maliknak retired to a nursing home in Seward because of ill health and her partner, Herman Ponchene, left as well; Mary Ponchene Pavloff died and the children under her care, Edison Fadaoff, Jr., Joseph Fadaoff, and William Pavloff left; William Wilfred Pavloff drowned; and James

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Fadaoff left after killing his common law wife, Rosemary Chilliak. The only consistent residents thereafter were Nick Pavloff and Johnny Maliknak.

The argument that the alleged Village was temporary unoccupied as a result of one or more acts of God or government authority is simply not supported by the evidence. The record is replete with evidence and statements that tragedies and the lack of employment opportunities on Woody Island were the primary causes of the depopulation and abandonment of the alleged Village.

Regarding the first alleged act of government authority, the announcement of restrictions on the use of FEDAIR IV in 1963, the evidence shows that, after the announcement, the ferry was still officially available to non-FAA regular residents of Woody Island and available in practice to other non-FAA Natives. Despite the availability of the ferry service during the 1960's, the population of the alleged Village continued to dwindle.

There simply was no testimony or statements from the Natives that the alteration, if any, in the availability of the ferry service caused them to leave or discouraged them from returning to the alleged Village. Maurice Harmon, Paul Harmon, and Mitch Gregeroff all stated that the termination of the ferry service was one of the factors influencing their decisions not to return to Woody Island, but the

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termination of the service occurred after 1970.

Numerous Natives stated that they left or did not live on Woody Island because of the lack of employment opportunities, and it is reasonable to infer from the statements of at least some of them that re-initiation of a ferry service to provide access to employment in Kodiak might cause them to move back to Woody Island. These statements only highlight the fact that, many years prior to 1970, nearly all of the potential permanent residents of Woody Island had joined the modern cash economy and adopted non-Native life-styles of full-time residency and employment in one particular place, and that place was not Woody Island.

Lastly, any restriction on use of the ferry service is simply not an act of government authority within the meaning of the regulations. The alleged Village was a village long before the CAA/FAA began the ferry service in the late 1940's. Throughout its history the island has remained accessible and has been accessed by skiff or dory by many people, at least during good weather. The provision of the ferry service was a special service not generally available to other Native villages or part of the Natives' traditional cultural patterns and life-style. Any cutback on its availability is not akin to actions which prompted inclusion of the "act of God" proviso in the regulations: the government relocations of Natives living in areas devastated by

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the 1964 earthquake and tidal waves.

The next alleged act of God is the 1964 earthquake and tidal waves. That event truly is an act of God, but it did not cause the unoccupancy of the alleged Village. No one left the island as a result of the earthquake, but, rather, one or two families actually returned shortly thereafter to stay for many months. At most, there is evidence that a few Natives (Maurice Harmon, Paul Harmon, and Mitch Gregeroff) may have been influenced by the effects of the earthquake in deciding not to return to Woody Island to live.

There is no doubt that the 1964 event rendered Woody Island more difficult to access. The western shoreline subsided, making it more difficult to beach boats, and the dock was destroyed and replaced by one which was more exposed to strong currents and tides, rendering it less safe for mooring boats.

However, the record does not show that these changes in the degree of difficulty of access caused the unoccupancy of the alleged Village. Throughout its history, Woody Island has lacked a safe harbor or moorage. It has always been difficult to access Woody Island in winter or bad weather, as the passage to and from Kodiak is dangerous in a small boat and there is no safe place to moor a larger boat, especially overnight. In warm or good weather, it

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has remained accessible by boat from Kodiak or elsewhere. Small boats could be and were often pulled up on the beach both before and after the earthquake. Also, boats could be and were moored by anchors and running lines to the beach. The change in access was simply not very substantial or significant.

More importantly, the record lacks substantial evidence that the change caused Natives to leave the alleged Village or to not return. The difficulties of traveling to and from Kodiak to access employment opportunities and other amenities available in Kodiak existed long before the earthquake. The pursuit of those opportunities and amenities led most of the Natives off of Woody Island prior to the earthquake. The incremental change in access had little effect on the Natives' decisions whether to remain on or return to the alleged Village.

The earthquake also converted the freshwater Lower Lake into a saltwater lagoon and temporarily destroyed the clam beds on the island. Respondents argue that the Natives had relied upon the Lower Lake for water and the clam beds for food. The record shows that any such reliance was unsubstantial and insignificant and that these alterations did not cause the unoccupancy of the alleged Village.

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The running water system drew water from the Upper Lake, as it had better water than the Lower Lake even prior to the earthquake. Where the system was not available or functioning, either before or after its construction, the Natives relied upon the Upper Lake and wells, and not the Lower Lake, for water. No potential permanent resident of Woody Island stated that the conversion of Lower Lake into a saltwater lagoon effected the decision of whether to remain on or return to the alleged Village.

Several Natives testified that the clam beds were a seasonal and insignificant source of food (see, e.g., Tr. 1033-34, 2754-56). Further, Mitch Gregeroff testified that the clam beds recovered after a year or so (Tr. 1412). No potential permanent resident of Woody Island stated that the temporary loss of the clam beds effected the decision of whether to remain on or return to the alleged Village.

Assuming that the damage to the running water system was caused by the earthquake, the statements or testimony from the Natives does not show that the earthquake damage to the water system caused the unoccupancy of the alleged Village. Before examining that evidence, it is worth noting that the alleged Village was well-populated prior to World War II without a running water system. The Natives relied upon wells and the

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Upper Lake for water. Many Natives lived in the North Village at various times, including Johnny Maliknak and Nicholas Pavloff up through 1970, yet the North Village has never had running water. There is no evidence to suggest that they could not have reverted to relying upon wells and lake water.

Also, the remedy for the earthquake damage to the water system was to cap the end of the 6- to 8-inch pipeline leading to the dock (Tr. 1448). Paul and Maurice Harmon tried in some undisclosed way to plug the line but failed (Tr. 1449). There is no other evidence to show whether fixing the line would have been expensive or difficult.

Christina Hoen addressed the damaged water system in an affidavit. She and her family returned to the alleged Village after the earthquake, but, according to Christina, they decided to leave within 8 months primarily because the Simeonoff house no longer had running water. In a deposition, however, she dismissed as "no big situation" the difficulty of living on Woody Island at that time with an "erratic" water supply, because "there are quite a few wells and springs over there that have been there for years and a good supply of fresh water."

Further, she testified that she and her family were not living on Woody Island in 1970 because of the lack of employment opportunities. Both she and her husband were concerned with the difficulty of

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commuting from Woody Island to work in Kodiak. She would return to Woody Island to live if the circumstances were right, i.e., if their employment and earnings were such that it was feasible and affordable to do so.

Maurice Harmon, Paul Harmon, and Mitch Gregeroff all stated that the lack of a functioning running water system was one of the reasons they had not returned to Woody Island to live, despite the fact that the Harmon house had a well. Another reason cited by all was the lack of employment opportunities. Many other Natives also referenced the lack of employment opportunities as the reason they had not returned to Woody Island, making no mention of the damaged running water system.

Respondents allege that the earthquake also reduced employment opportunities for potential permanent residents of Woody Island. Mitch Gregeroff, who had been living and working in a cannery in Kodiak in 1964, did state that he moved to the State of Washington for employment when the Kodiak Island canneries were wiped out by the earthquake and tidal waves. However, by 1966 there were 18 seafood plants in Kodiak and 8 more at other points on Kodiak Island where' he could have sought employment. More importantly, from 1964 to 1969 he actually continued working in Alaska as a commercial fisherman for nine months of each year. Yet, for the other three months he

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returned not to Woody Island, but to Washington State, where his wife and child resided full-time. There is no substantial evidence of earthquake-caused reductions in employment opportunities inducing Natives to leave Woody Island or to refrain from returning there to live.

Another alleged act of government authority is the imposition of property taxes by the Borough of Kodiak Island, beginning in the mid- to late-1960's. Assuming that this taxation is an act of government authority within the meaning of the regulation, there is little or no evidence that the taxation caused the unoccupancy of Woody Island on April 1, 1970.

The Borough was created shortly after the 1964 earthquake, probably in the fall of 1965 (Tr. 2920; Ex. S-6I, p. 17), and the alleged Village was nearly deserted by the time that the taxation began. Wilton White, the head of the Borough for many years, testified by deposition that only two or three properties on Woody Island were being taxed and that one of them was the property of the Chaffin's (*id.*, p. 31). Evidence of Native property being taxed is limited to the Sundberg, Fadaoff/Madsen, and Simeonoff houses. The unpaid taxes on the Fadaoff/Madsen house amounted to only \$365.00 by the early 1970's.

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Esther Sundberg Denato testified that the Pavloffs deeded whatever interest they had in the Sundberg homesite to her father and that she believed the Borough eventually foreclosed on that property for failure to pay taxes (Tr. 2854-55). The context of her testimony suggests that this occurred in the late-1970's. Neither she nor any other Native testified that they left the alleged Village or did not return to the alleged Village during the decade ending in 1970 because of the Borough's taxation.

The Viet Nam War is another alleged act of government authority. As a result of their participation in the war, Daniel Harmon and Freddy Simeonoff were killed and have not been claimed by Respondents as permanent residents of the alleged Village. If there was evidence that they were drafted, as opposed to having enlisted, there might be a legitimate argument that the war was an act of government authority within the meaning of the regulation. There is no such evidence.

Finally, Respondents claim that the closing of the Woody Island school in 1969 was an act of government authority. They also make passing reference to the adverse effects of the related closing of the FAA facility and ferry service, alleging that the FAA's closing deprived Natives of employment opportunities.

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The record shows that neither the school closing nor the closing of the FAA facility and ferry service caused the unoccupancy of Woody Island on April 1, 1970. The termination of the FAA ferry service had no bearing upon the unoccupancy on April 1, 1970, as the service did not terminate until after that date.

Nor did the FAA facility closing have any bearing, as it was not a significant source of employment for local Natives and did not close until after 1970. There were still seven or eight FAA families living and working on Woody Island on April 1, 1970 (Tr. 656). More importantly, the record shows that, throughout its existence on Woody Island, the FAA hired only one local Native for a full-time position (Tr. 2748; Ex. S-6D, pp. 19-20). That Native was Kelly Simeonoff, Sr. (Tr. 2748), who left FAA employment in 1956.<sup>4</sup> The only evidence of local Natives being employed by the FAA in the 1960's is the short-term, temporary hiring of a few Natives to assist in clearing land for construction of the VORTAC facilities in 1963 and 1964.

An affidavit was submitted with Leisnoi's application which was executed by numerous

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<sup>4</sup>If "local" is defined as the Kodiak Archipelago, then another local Native, Bill Torsen from Ouzinkie, worked full-time for the FAA from 1962 to 1966 (Tr. 2062-64).

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Natives and which states that the school closing caused the unoccupancy of Woody Island in 1970. In contradiction to this affidavit, the affiants also submitted affidavits attesting to their occupancy of Woody Island in 1970, thus discrediting all of the affidavits. One affiant, Marie Redick Unger, corrected herself in a deposition, testifying that the closing of the school was not the reason why she had not returned to Woody Island (Ex. S-6L). Another affiant, Karl Armstrong, testified by deposition that he was not aware of anyone who left Woody Island or who would not return because of the school closing (Armstrong Depo., pp. 64-65, 79-80).

Fred Zharoff, who was raised in Kodiak and lived on Woody Island for only a few months in 1977 during renovation of the FAA housing, testified that he moved back to Kodiak for better access to schools and employment. However, there is no indication that he or any other Native would have lived on Woody Island during the year between the closing of the Woody Island school and April 1, 1970, if the school had remained open. No non-FAA Native had attended the school since approximately 1965 and the alleged Village was nearly deserted by the time the school closed in May of 1969.

In summary, Respondents failed to make a prima facie showing that any acts of God or government authority, individually or in

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combination, caused the unoccupancy of Woody Island on April 1, 1970, or that the unoccupancy was temporary. Consequently, the "act of God" proviso was not invoked and does not apply. Therefore, the alleged Village must meet the occupancy requirement of 25 C.F.R. § 2651.2(b)(2) and evidence of unoccupancy during the decade ending in 1970 is material and relevant to the determination of whether there were 25 or more permanent residents of the alleged Village on April 1, 1970.

### 4.

**Did the Village, as of April 1, 1970, constitute a "Native village" and have an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and life-style?**

Protestant contends that the alleged Village did not meet the requirement of 43 C.F.R. § 2651.2(b)(2), that "[t]he village shall have had on April 1, 1970, an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and life style \* \* \*." Protestant correctly argues that this requirement is related to another requirement: that the alleged Village must have constituted an established "Native village", i.e., a "tribe, band, clan, group, village, community, or association" within the meaning of the Section 3(c) of ANCSA, 43 U.S.C. §

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1602(c), which defines "Native village". See Bureau of Sport Fisheries & Wildlife v. Village of Salamatoff, ANCAB VE 74-12 (June 9, 1974) at 5, 8-16. He contends that the alleged Village failed to meet this requirement as well.

Protestant is correct that, as of April 1, 1970, the alleged Village failed to meet the requirements of being a "Native village" and having an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and life-style. Numerous witnesses, most familiar with the characteristics of other Native villages, including several Natives, and a Leisnoi Director, Bruce Robertson, testified that no Native village or active community existed on Woody Island in 1970 or even earlier (see, e.g., Tr. 103-06, 193, 244, 294-98, 631-32, 646, 649, 1725-26, 2013, 2091, 2403; Exs. L-DOC-132; S-6E, pp. 10, 30-31; S-6I, pp. 9-10).

Consistent with the assessment of these witnesses, several studies and reports, including studies commissioned by Congress for purposes of ANSCA, indicated that the alleged Village was not an existing Native village by 1970, and did not have 25 Native residents. "Alaska Natives and the Land", Exhibit S-1, dated October 1968, was prepared by the Federal Field Committee for Development Planning in Alaska, and was commissioned by Congress in anticipation of ANCSA. It was

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subsequently adopted as an appendix to the Senate Report issued by the Senate Committee on Interior and Insular Affairs for Senate Bill 35. See Senate Report No. 92-405, 92<sup>nd</sup> Congress, 1<sup>st</sup> Session, at 73-74. The publication was prepared and used for guidance in drafting the provisions of ANCSA itself.

The publication contains a section on villages in the Kodiak region. Figure III-66, on page 249, contains a table showing the "Historic Native Places and Current Status" of places in the Kodiak Region. Leisnoi is listed in the table - along with a notation in the column labeled "*Abandoned*." Figure III-67, on page 250, contains a map showing the location of "Historic Native Places [in the] Kodiak Region." The map shows 20 "historic" Native places in and around Kodiak Island - including Leisnoi (spelled "Leisnoi"). Figure III-68, on page 251, contains a map showing "Current Places with Native Population [in the] Kodiak Region." The map shows 8 places in and around Kodiak Island with current Native populations. Leisnoi is not included. The publication also includes a large, fold-out, map of Alaska, showing the location of Native and non-Native places having a Native population of 25 or more. The map shows 8 places in and around Kodiak Island having a population of 25 or more Natives. Again, Leisnoi is not included.

The Federal Field Committee for Development Planning in Alaska prepared another

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publication dated 1967 and entitled "Villages in Alaska and other Places Having a Native Population of 25 or More." (Ex. S-2) The preface states that it is a compilation of villages and places having 25 or more persons, half or more of whom are Natives, as well as places that are predominantly non-Native but which have a Native population of at least 25. The preface also states that the principal source for its Native population estimates was the Bureau of Indian Affairs, but that the estimates were also measured against figures provided by leaders of Native organizations, the Alaska Office of Economic Opportunity, VISTA, the Public Health Service's Division of Indian Health, Alaska State Community Action Program, and other agencies, as well as against Native school enrollment figures provided by the Bureau of Indian Affairs and the Alaska Department of Education. The publication's "Alphabetical Directory" lists seven villages within the Kodiak Island Borough, but does not include Woody Island or Leisnoi. The "Census Directory" similarly lists Kodiak and identifies six villages in the Kodiak area, but does not include Woody Island or Leisnoi.

Woody Island is listed as an island in the Government publication "Dictionary of Alaska Place Names," dated 1967 (Ex. L-BOOK-65). However, it is not also listed as a "village," "town," or "locality," as are other villages, towns and localities listed in the publication. Similarly, in the publication

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"Effects of the Earthquake of March 27, 1964 on the Communities of Kodiak and Nearby Islands," prepared for use by the Department of Interior, Geological Survey (Ex. L-BOOK-80). Woody Island is not included as a "community," nor is it listed in the tables or on the "Index map showing location of communities on Kodiak Island and nearby islands," even though the Island itself is shown on the map (id., at F3, F4).

According to the witnesses, the alleged Village, unlike most other Native villages, had no church, stores, post office, fuel supply, consistent population, or Native, tribal, or village association, government, or chief. Mr. Wooley acknowledged that other villages had such infrastructure (Tr. 2303-04).

The alleged Village merely had less than a half-dozen houses which weren't being occupied with any frequency or consistency and generally were not well-maintained by 1970. Mr. Wooley referenced the houses as evidence of the alleged Village's identifiable physical location, but the existence of several houses, without more, does not constitute the location of a community with social, economic, and cultural ties.

Mr. Wooley de-emphasized the presence of physical structures when addressing the absence of a church building on Woody Island since 1951. He

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testified that faith relates to a community of people and not a physical structure (Tr. 2171).

Both he and Dr. Davis stressed the importance of the Russian Orthodox Church in Native culture as a religious, social, and political institution. Yet, they did not adequately come to grips with the fact that church-related social and religious activities and ceremonies, such as masquerading and caroling, occurred infrequently, if at all, on Woody Island after World War II.

In general, there is little evidence of communal activities on Woody Island after World War II. Karl Armstrong testified as to the importance of banyas (steambaths) as a place for socializing (Armstrong Depo., pp. 124-27) and there is conflicting evidence as to whether the banyas on Woody Island were used much. Without reference to a time period, Joseph Fadaoff, born in 1954, testified, "I'm sure a lot of people used [banyas]." (Tr. 1039). On the other hand, Patricia Hampton, born in 1948, testified that the banyas on Woody Island were not used after 1958 (Ex. S-6O, pp. 37-38). Mr. Armstrong also testified as to the social significance of the practice of chipeting, but the evidence of this practice occurring after World War II is limited to his testimony that he, Charles Naughton, and Ed Hall chipetted a few times. Joseph Fadaoff also testified as to "a lot of visiting" among the extended family in the South Village

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area (Tr. 1046). However, most of the people living there left before the 1964 earthquake. Zelma Stone was not aware of any regular meetings or congregations of Natives in the alleged Village (Tr. 494).

Numerous witnesses testified, in effect, that there was no regular or substantial Native activity, such as occupying the Native houses, camping, picnicking, hunting, fishing, or berry picking, from the mid-1960's through 1970 (see, e.g., Exs. S-6D, pp. 37-38, 42, 51; S-6O, pp. 21-22; Tr. 414, 416, 424, 461, 633-34). While those activities did occur, the nature and extent of those occurrences was not sufficiently substantial to support a conclusion that a community still existed there by the mid-1960's.

Dr. Davis testified in 1998 that smaller villages tend not to have churches any longer, but she did not specifically address whether this was the trend in 1970 (Tr. 3646, 3649). She did acknowledge that in the 1960's most Native villages had both a formal male chief and a lay leader connected with the church (Tr. 3608-10). The alleged Village had neither after World War II.

Dr. Davis pointed to the leadership or elder status of Ella Chabitnoy in the South Village and Angeline Maliknak in the North Village in the early 1960's, but there was no conjoining of that leadership into a clan. In fact, Dr. Davis testified

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that the South Villagers and North Villagers were not necessarily cognizant of the activities of each other (Tr. 3489). Further, both Ella and Angeline had moved off of Woody Island many years before 1970.

Dr. Davis acknowledged that there were dissimilarities between the alleged Village and other Native villages but she concluded that there were more similarities than dissimilarities (Tr. 3650). However, she did not support her conclusion with any enumeration of the similarities.

She did compare the alleged Village to the Village of Chitina, which, according to ANCAB, did have an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and life-style. Holdsworth v. Village of Chitina, ANCAB VE 74-10 (June 10, 1974) at 25-26. She testified that Chitina had 237 enrollees but only 2 full-time residents (Tr. 3647). The numbers are similar for the alleged Village in 1970.

ANCAB described the Chitina Natives and their historical cultural patterns as follows:

The Chitina Natives are part of a sub-dialect culture called Ahtna which is part of the larger Athapascan Linguistic Group \* \* \*. Historical documents show that these Natives

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have inhabited the Copper River valley [where the alleged village site is located] at least as early as the late 18<sup>th</sup> century \* \* \*. Their cultural patterns and life styles reflect a migratory existence based primarily on hunting, fishing, berry picking and trapping for personal and tribal subsistence \* \* \*. Although the Natives lived a dispersed and migratory existence, they would nevertheless come together in the spring at fishing stations along the Copper River \* \* \*.

Village of Chitina, supra, at 25-26.

Dr. Davis testified that nearly half of the Chitina Natives were living in Anchorage, Alaska, by 1970 for reasons similar to those which motivated the alleged Village Natives to live in Kodiak and elsewhere: economics, schooling, and modern amenities (Tr. 3648). She testified that the pattern of village visitation for the Chitina Natives and the alleged Village Natives were very similar (Tr. 3648).

However, she did not describe how they were similar other than to say that the visitors would stop to say "hello" to persons such as Nick Pavloff and Johnny Maliknak (id.) - an apparent reference to any full-time residents. In actuality, the cultural

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and visiting patterns were not similar.

Dr. Davis spoke of the seasonality of use of Woody Island, but historically Woody Island was the site of a village with scores of full-time or near full-time residents rather than a place, such as Chitina, where the Natives came together only seasonally. Further, once the alleged Village Natives abandoned the village site many years prior to 1970, they did not "come together" there. The record shows that there were no congregations of a substantial portion of the alleged Village Natives each year or even sporadically. Those that did visit typically came individually or in very small groups, irregularly and infrequently, and primarily for recreational rather than subsistence purposes.

The evidence shows that this use was not occupancy consistent with the alleged Village Natives' own cultural patterns and life-style. It was not consistent with the historical use of the alleged Village as a site of long-term residency by scores of Natives. While it might be consistent with those Natives' cultural patterns and life-style for the alleged Village to evolve from a sight of long-term residency into a site of seasonal occupancy for subsistence purposes, the actual use of the alleged Village site for many years preceding 1970 was not seasonal "occupancy" nor primarily for subsistence purposes.

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In actuality, nearly all the alleged Village Natives simply shifted the site of their long-term residency from the alleged Village to Kodiak or other places. Their social, cultural, and economic ties became centered in Kodiak and elsewhere. The nucleus of community, group life, or association was not at the alleged Village.

When questioned whether the alleged Village had a location evidenced by occupancy consistent with the Natives' own cultural patterns and life-style, Dr. Davis replied affirmatively, explaining that "[i]t would be consistent with the Native sense to have a place that you were born, a place that you had an identity with." (Tr. 3515) Her explanation has little to do with the character or nature of the alleged occupancy but much to do with the choice of location.

The nature of their use of the alleged Village for many years prior to 1970 may be likened to use of a favorite park or picnic spot. They went there primarily on day trips for recreation. The use was not peculiar to their Native cultural patterns and life-style but similar to the use of the island by non-Natives. The Natives had adopted a non-Native life-style and used (not occupied) the alleged Village site accordingly.

Quoting ANCAB's Decision in In re Eyak, Koniag correctly argues the concept of the "Natives'

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own cultural patterns and life-style"

cannot be interpreted to contemplate exclusively the cultural patterns of Alaska Natives existing before contact with Caucasians. Such an interpretation could possibly exclude from benefits every village listed in the act, for the patterns of life in all such villages have been modified by the influence of non-Native culture. Accordingly, the character of occupancy of an area in terms of native cultural patterns and lifestyle must be assessed in the light of conditions existing in 1970 and the historical influences under which such conditions developed.

\* \* \* \* \*

[T]raditionally Native activities and customs, such as berry picking, subsistence hunting and fishing, and the use of bonyas \*\*\* are not rendered less Native in character merely because, in 1970, non-Natives also engaged in them.

Id. at 32-33. On the other hand, as previously mentioned, erosion of Native cultural patterns and the gradual adoption of non-Native customs,

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technology, and the like, including long-term residency in another place, may be evidence of abandonment of the alleged village and life-style associated with "home".

The record shows that the Natives largely abandoned a life-style of subsistence activities and the use of bonyas as a social custom, and adopted a non-Native life-style, particularly with respect to their use of the alleged Village. By no later than the mid-1960's, they used it primarily for recreation and did not engage in substantial subsistence or communal activities there. The practice of the Russian Orthodox religion at the Village of Eyak was considered a distinguishing characteristic of the Native culture there. Village of Eyak, *supra*, at 32-33. No such practice occurred on Woody Island during the decade ending in 1970.

### 5.

#### **As of April 1, 1970, were the majority of residents of the alleged Village Native?**

Finally, Protestant contends that the alleged Village did not meet the requirement that "a majority of the residents must be Native." 43 C.F.R. § 2651.2(b)(4); see also 43 U.S.C. § 1610(b)(3). He argues that only Natives who are enrolled to the alleged Village qualify in determining if a majority of the residents are Native, citing Village of Eyak,

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supra, at 35-36. Whether or not that case stands for the proposition argued, it appears inconsistent with the holding in Koniag, Inc. that a Native need not be an enrollee of a village to qualify as a permanent resident thereof. 405 F.Supp. at 1373-74. Consequently, Protestant's argument is rejected.

His contention that the alleged Village did not meet the Native majority requirement is also rejected. While there were very few Native residents as of April 1, 1970, there were no non-Native residents and therefore a majority of the residents were Native.

### E.

#### **Should the hearing be reopened to allow Respondents further opportunity to present evidence on the subjective intent of potential permanent residents of the alleged Village?**

Leisnoi, at pages 151-52 of its posthearing answering brief, states:

[At] [p]ages 163 through 165 of his Opening Brief, Stratman argues that persons who had not lived in the Native Village of Woody Island for an extended period of time cannot be found to be permanent residents of the

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Village unless they gave direct testimony of their subjective intent. \* \* \*

This Court allowed only two weeks of testimony for the hearings in this case. Half of that time was given to the Protestant. Woody Island therefore only had one week of time in which to call witnesses. If the Court were to accept Stratman's theory that only persons who testified live can be deemed to be permanent residents of Woody Island, unless they had lived on the island year-round, then the hearings should be reopened to give the Native Woody Islanders a reasonable opportunity to present many more witnesses.

\*\*\*\*\*

\* \* \* [I]f the Court is inclined to go along with the Protestant's theory, then due process would require that the Native Woody Islanders be given a reasonable opportunity to present testimony from many more Leisnoi

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shareholders.

Because Leisnoi characterizes Protestant's theory in two different ways, it is impossible to determine precisely what it finds objectionable. Nevertheless, this Recommended Decision does not purport to adopt either characterization, but, rather, to assess a multitude of factors and types of evidence in determining whether there were 25 or more permanent residents of the alleged Village as of April 1, 1970. For this reason, Leisnoi's suggestion that the hearing should be reopened is denied.

It is denied for the additional reason that Leisnoi was afforded ample opportunity to present evidence at the hearing. The hearing schedule was established by the consensus of all parties. If Leisnoi felt that it needed additional time to present evidence, it should have made that request at an earlier date.

In an April 24, 1998, letter to the parties, I noted,

Based on motion, and my understanding of the consensus, the hearing will be held in Anchorage on August 4 through 7, and in Kodiak on August 10 through 13, 1998. Further Anchorage hearing could be held on

## APPENDIX E-231

August 14, if that would serve a useful purpose. If any party has serious difficulty with this scheduling, he should notify the other parties and me **by return mail.**

In a May 13, 1998, letter to the parties, I stated:

As it stands now, we are to have hearings in Anchorage August 4 through 7, and 14, and in Kodiak August 10 through 13 (with a viewing August 8 or 9). At this point, it appears it may be beneficial to commence the hearing in Anchorage on Monday, August 3, particularly if this could mean the difference between completion of the hearing in this 2 week span or not. Your suggestion in this regard will be appreciated.

Pursuant to the parties' subsequent suggestions, the date for commencement of the hearing was revised to August 3, 1998, by Order dated July 15, 1998. With the addition of another day for hearing and typically extended hours for hearing each day, the hearing actually concluded several hours earlier than anticipated on August 14. At that time the parties were asked if they had any additional evidence to present and both Leisnoi and

## **APPENDIX E-232**

Koniag and indicated that they had completed their presentation of evidence (Tr. 3658-63).

### **V.**

#### **Conclusion**

Without further belaboring this Recommended Decision with additional references to contentions of fact and law, I hereby advise that all proposed findings or conclusions submitted by the parties have been considered and, except to the extent they have been expressly or impliedly adopted herein, they are rejected on the ground they are, in whole or in part, contrary to the facts and law or are immaterial.

Based upon the foregoing, it is ordered that the alleged Village be certified as not eligible for benefits under sections 14(a) and (b) of ANCSA because:

- (1) The alleged Village did not have 25 or more Native residents on April 1, 1970,
- (2) The alleged Village, as of April 1, 1970, was not an established Native village and did not have an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and life-style, and

## APPENDIX E-233

(3) Less than 13 enrollees to the alleged Village used it during 1970 as a place where they actually lived for a period of time.

/signed/

Harvey C. Sweitzer  
Administrative Law Judge

### **INFORMATION REGARDING FILING OF OBJECTIONS TO RECOMMENDED DECISION**

Pursuant to Page 11 of the Board's November 21, 1997, Order, a copy of this Recommended Decision is served on each party and each shall have 30 days from receipt of the decision within which to submit briefs to the Board registering their objections to the decision. Those briefs should also address any legal issues considered by the parties to be case dispositive.

Respondents have all moved for additional time within which to submit said briefs to the Board. No ruling is made thereon because the Board established the 30-day deadline and any such motion should be directed to and decided by the Board.

## **APPENDIX E-234**

**See page 101 for distribution.**

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## APPENDIX E-235

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**APPENDIX F**

**Secretarial Order No. 2965**

**dated June 10, 1974**

## APPENDIX F - 1

U.S. DEPARTMENT OF THE INTERIOR  
MARCH 3, 1849

United States Department of the Interior

OFFICE OF THE SECRETARY  
WASHINGTON, D.C. 20240

JUN 10 1974

ORDER NO. 2965

Subject: Completion of Determination of Alaska Native Village Eligibility

Sec. 1. In Solicitor's Opinion M-36876, of May 29, 1974, it is concluded that two and one half years is a directory rather than mandatory time under the Alaska Native Claims Settlement Act, 43 U.S.C. Sec. 1601-1624, in which the secretarial determination can be made concerning the eligibility of any Alaskan Native Village for benefits under that Act. In view of that opinion, and in reliance thereon, it has been decided to provide an opportunity for full hearing to all parties in all disputes now or hereafter pending before the Alaska Native Claims Appeal Board concerning Native Village eligibility. This decision has been made in order to provide all parties due process of law and in order to develop a complete record so that the final secretarial determination of Native

## APPENDIX F - 2

Village eligibility will be as correct, fair and just as possible. It is therefore ordered as follows:

- a. The Alaska Native Claims Appeal Board is to proceed expeditiously with the hearing of all cases concerning the determination of village eligibility which are pending before it, without denial of Due Process to the parties involved.
- b. All employees of the Department of the Interior are to cooperate with the Alaska Native Claims Appeal Board in reaching a speedy resolution of matters pending before it. All employees requested by the Board or any Administrative Law Judge to testify before, or furnish relevant information to, the Board are directed to comply with such request.
- c. All determinations of village eligibility or ineligibility made by the Area Director, Bureau of Indian Affairs, Juneau, Alaska, which have been or are appealed to the Alaska Native Claims Appeal Board are suspended for all purposes except as the determinations vest the Board with jurisdiction and the determinations

## APPENDIX F - 3

bear on the burden of proof in hearings before the Board in the respective cases. All such determinations which have been or are appealed to the Board are not final actions of the Department of the Interior and shall not be considered as determinations made by the Secretary of the Interior until the Secretary has personally made such determinations.

- d. If any provision of the regulations appearing at 43 CFR Part 2650 is inconsistent with any portion of this order, such regulation is hereby waived pursuant to the terms of 43 CFR 2650.0-8.

Sec. 2. This order is effective immediately.

/s/ Secretary of the Interior

**APPENDIX G-1**

**Statement of Edward Weinberg  
before the House Comm. on Interior  
and Insular Affairs, 96<sup>th</sup> Cong.**

**dated February 6-8, 1979**

## APPENDIX G - 1

### STATEMENT OF EDWARD WEINBERG, COUNSEL FOR KONIAG, INC. BEFORE THE HOUSE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS AT HEARINGS ON H.R. 39 FEBRUARY 6-8, 1979

My name is Edward Weinberg. I am a member of the law firm of Duncan, Brown, Weinberg and Palmer, P.C., with offices in Washington, D.C. and Anchorage, Alaska. I am national counsel for Koniag, Inc., the regional Native corporation created under the Alaska Native Claims Settlement Act which covers the area of Kodiak Island and a portion of the western side of the Alaska Peninsula lying roughly between Lake Becharof and the western boundary of the Aniakchak National Monument. I also represent the Koniag villages in connection with the resolution of their land problems under the Alaska Native Claims Settlement Act.

With me today are Karl Armstrong, Executive Vice President of Koniag, Inc. and President of one of the Koniag villages, Leisnoi, Inc., and Mr. Gene Sundberg, Vice President for Lands of Koniag, Inc. and a member of the Board of Directors of Afognak Natives, Inc., another of the Koniag villages.

## APPENDIX G - 2

Most of Kodiak Island is within the Kodiak National Wildlife Refuge. Of the land on Kodiak Island outside the wildlife refuge, most was selected by the state of Alaska under the Alaska Statehood Act prior to the enactment of ANCSA and a large portion of the state selected lands were tentatively approved by the Secretary of the Interior for conveyance to the state prior to the passage of ANCSA. To the north of Kodiak Island is an island of almost 500,000 acres known as Afognak Island. All of Afognak Island is within the Chugach National Forest. And, of course, the City of Kodiak is also located on Kodiak Island, as is the Kodiak Island Coast Guard Base.

Because of these federal reservations and the presence of the City of Kodiak, the land selection opportunities of the Koniag villages on Kodiak Island and Afognak Island were severely restricted. As a result, both those Koniag villages whose entitlement exceeded the limited amount of land available on Kodiak and Afognak Islands, and Koniag, Inc. whose subsurface estate entitlements were severely limited on Kodiak Island by reason of the existence of the Kodiak National Wildlife Refuge, were required under ANCSA to make what is known as deficiency selections elsewhere. The land withdrawn by the Secretary of the Interior for deficiency selection is located on the Alaska Peninsula in the area from Becharof Lake

## APPENDIX G - 3

southward to the area included in the Aniakchak National Monument recently established by Presidential Proclamation.

The Alaska Peninsula is separated from Kodiak Island by the Shelikof Strait, over 90 miles wide and comprising some of the roughest waters in the world. While the deficiency area on the mainland includes what is considered to be some of the finest wildlife habitat in the world, it has little, known economic value to Koniag and the Koniag villages. Further, the Alaska Peninsula is not an area with which the Koniag Natives have a cultural affinity. The Koniag Natives do not inhabit or frequent the Alaska Peninsula.

A second element of Koniag's land problem is the village eligibility litigation. Seven Koniag villages are involved.

The uncertain eligibility status of the seven uncertified villages complicates and delays the completion of ANCSA land selections and conveyances throughout Alaska. Until the eligibility status of these seven villages is determined, it is impossible to ascertain the total number of acres available under section 12(b) of ANCSA, which provides that the difference between 22,000,000 acres of the land entitlements of eligible village corporations is to be allocated among the eleven Alaska regional corporations

## APPENDIX G - 4

(exclusive of Sealaska) on a relative population basis, and which provides further for a reallocation by each regional corporation of its share of the 12(b) acreage among eligible village corporations within its boundaries. Likewise, it is impossible to complete the determination of regional corporation land entitlements under section 12(c) of ANCSA, which provides for allocations totalling 16,000,000 acres determined on a formula which includes as a factor the number of acres within each region which is selected pursuant to sections 12(a) and 12(b).

The seven village eligibility cases have been remanded by the United States Circuit Court of Appeals for the District of Columbia to the Secretary of the Interior for further administrative proceedings. Should it be necessary to resort to these further administrative proceedings in order to resolve the eligibility of the seven villages, further extensive time delays will be encountered, thus delaying further final land determinations and conveyances under ANCSA.

A third factor complicates Koniag land entitlements. There are some unresolved disputes over land entitlements between the Kodiak Island Borough and certain of the Koniag villages. One involves lands which the Borough considers essential to its watershed for water supply purposes. Another concerns some very valuable land near the city of Kodiak which the Borough

## APPENDIX G - 5

disposed of to third parties as homesites and for residential development purposes subsequent to the enactment of ANCSA. A third concerns other lands on Kodiak Island which were TA'd to the state and which the Borough, in turn, seeks to obtain from the state.

In sum, to a very considerable extent, unless the Congress remedies the situation, Koniag and the Koniag villages will not realize the fundamental objective of the settlement envisioned by Congress when it enacted ANCSA, that the Alaska Natives in each region be provided an economically viable land base.

The Koniag Amendment responds to these problems. The Koniag people are realists. They have understood early and well that no matter how unfair the operation of ANCSA has been in their case by reason of circumstances over which they have had no control, springing largely from decisions taken in Washington as long ago as the turn of the century without their knowledge or consultation, no proposal to rectify their situation is going to be viable unless it dealt with the interests of others who are affected in a manner in which those others regard as fair and reasonable.

Realizing that, Koniag over a period of almost eight months painstakingly negotiated with the Department of the Interior, the Alaska Coalition,

## APPENDIX G - 6

the Alaska state government, and the Kodiak Island Borough. In each instance, as examination of details revealed specific problems, they were resolved in a mutually satisfactory fashion. In the end, Koniag was able to present to the Congress, before the Senate Committee completed its work on last year's version of H.R. 39, a legislative proposal which was supported by the Alaska Coalition, the Alaska state government, the Kodiak Island Borough and the Department of the Interior, in addition to Koniag, the Koniag villages and the Alaska Natives themselves through the Alaska Federation of Natives.

The Koniag Amendment is a finely tooled, delicately balanced resolution of a number of complex problems.

Central to the resolution of Koniag's land problem is an exchange of land on the Alaska Peninsula to which Koniag and certain of the Koniag villages are entitled because of the deficiency of land in and around Kodiak Island to satisfy their entitlements, for land on Afognak Island. As for the acreages, Koniag and the Koniag villages give up more acreage than they will receive.

While the Koniag Amendment had not evolved when this Committee concluded its hearings last year and took action upon H.R. 39, we kept this Committee's staff currently and

## APPENDIX G - 7

completely informed and have had the benefit of numerous discussions with the staff as the Amendment evolved.

Finally, we are grateful that the Chairman of the full Committee, the Chairman of the Subcommittee and Representative Young of Alaska support the Koniag Amendment.

Unlike the Alaska Peninsula, Afognak Island is a part of the homeland of the Koniag people. Afognak Island has traditionally played a special role in the history and culture of the Koniag people. They were not consulted in what amounted to the expropriation of much of their homeland through the inclusion of Afognak Island in the Chugach National Forest and the establishment of the Kodiak National Wildlife Refuge. In reacquiring land on Afognak Island through the Koniag amendment, the Koniag people will be returning home.

In summary, the Koniag Amendment would:

1. Exchange selection rights on the part of Koniag and Koniag villages to almost 300,000 acres of surface and underlying subsurface estate and an additional approximately 40,000 acres of surface estate on the Alaska Peninsula between Becharof Lake and the area that would be encompassed by the

## APPENDIX G - 8

Aniakchak-Caldera National Monument, for some 280,000 acres of surface and underlying subsurface estate on Afognak Island now within the Chugach National Forest. The Alaska Peninsula lands that Koniag and its villages would surrender are described by the Alaska Coalition as "some of the very finest wildlife habitat in the world," and part of "the finest wildlife area in Alaska."

2. Assure public access for sports hunting, fishing and other recreational purposes to the Afognak Island land that would be transferred to Koniag and its villages, pursuant to cooperative management agreements with appropriate federal, state and local agencies.
3. Restrict Koniag's retained subsurface rights on the mainland to oil and gas under regulations designed to minimize interference with the surface values. Koniag would, therefore, give up all hardrock mineral values.
4. Guarantee the retention in federal ownership, through addition to the Kodiak National Wildlife Refuge, of both islands offshore of Afognak Island and the "Red Peaks" area of over 46,000 acres, the latter being an area having unusual scenic and

## APPENDIX G - 9

recreational value.

5. Preserve within the Aniakchak National Monument almost 50,000 acres of land which, absent the Koniag proposal, would be conveyed under ANCSA to Koniag villages, with conveyance of underlying subsurface estate to Koniag, Inc.
6. Preserve state selection rights to some 4,000 acres of land on Afognak Island heretofore selected by the State of Alaska under section 6 of the Alaska Statehood Act.
7. Resolve, in a mutually satisfactory manner, a long standing dispute concerning the eligibility of seven Koniag villages for benefits under the Alaska Native Claims Settlement Act in a manner which imposes no substantial additional land burden upon the United States, thus bringing to an end extensive administrative and judicial proceedings which otherwise may delay for several additional years the final determination of the respective entitlements of all twelve Alaska regional corporations and their eligible villages to almost 500,000 acres of land.
8. Resolve, in a mutually satisfactory manner, disputes between the affected Native

## APPENDIX G - 10

corporations and the Kodiak Island Borough involving conflicting selection claims.

9. Assure management of the Afognak Island elk herd by either federal or state game managing agencies.
10. Assure protection of Afognak Island denning areas of the world renowned Kodiak brown bear.
11. Without the Koniag proposal about one quarter of the 458,000 acres of land on Afognak Island will in any event be conveyed to Native corporations. Thus, regardless of the Koniag proposal the Forest Service will lose its present land monopoly on Afognak Island. The Red Peaks area which (with the large offshore Ban Island) totals approximately 46,000 acres, is not forested, but has substantial scenic and recreational value. These 46,000 acres, therefore, should not be regarded as a loss to the primary mission of the Forest Service, which is the management of federally owned timber lands. They will remain in federal ownership and be managed for their true values, which are recreation and wildlife.

Appended to this statement for the use of the Committee and its staff are the following

## APPENDIX G - 11

documents which we also request be included in the record:

1. The Koniag Amendment.
2. A section-by-section analysis of the Koniag Amendment.
3. A table dated January 25, 1979, entitled "Koniag Proposal," showing the acreages to be exchanged under the Koniag proposal.
4. Letter from Acting Secretary of Agriculture Wedington to Senator Jackson dated September 11, 1978.
5. Letter from Edward Weinberg to Senator Jackson dated September 13, 1978, commenting on the Agriculture letter of September 11, 1978.
6. Letter of September 11, 1978 from the Alaska Coalition to Senator Jackson and Alaska Coalition's press release.
7. Excerpts from S. Rep. 95-1300, 95<sup>th</sup> Cong., 2d Sess. (the Report of the Senate Committee on Energy and Natural Resources on H.R. 39, 95<sup>th</sup> Cong., 2d Sess.) regarding the Koniag Amendment.

## **APPENDIX G - 12**

Thank you for the opportunity to present this statement.

## **APPENDIX G-13**

### **Section by Section analysis of ANILCA Section 1427**

## APPENDIX G - 13

### KONIAG AMENDMENT TO H.R. 39

#### SECTION BY SECTION ANALYSIS

Subsection (a) defines pertinent terms.

Subsection (b)(1) identifies the Native corporations to receive title to the lands on Afognak Island to be conveyed pursuant to the section, and provides that such conveyances shall be in full satisfaction of the rights of each of such corporations to conveyance under the Alaska Native Claims Settlement Act of lands and interests therein on the Alaska Peninsula.

Subsection (b)(2) identifies exceptions to the conveyances provided for in subsection (b)(1).

Subsections (b)(3) and (b)(4) provide the mechanics of effectuating the extinguishment of certain Koniag Native corporation deficiency selection rights on the Alaska Peninsula in exchange for which the conveyances of land on Afognak Island are to be made.

Subsection (b)(5) provides for cooperative management agreements between the appropriate Koniag Native corporations and the Department of the Interior, appropriate state agencies and

## APPENDIX G - 14

appropriate local political subdivisions (to the extent that the Department and such state and local agencies wish to enter into such agreements), under and pursuant to which lands on Afognak Island to be conveyed to the Native corporations under subsection (b)(1) will be open to hunting, fishing and other recreational uses. The cooperative management agreements will define the lands to be so opened, the conditions under which they will be opened, and will establish appropriate limits and conditions upon the recreational uses.

Subsection (c) provides that the surface estate on Afognak Island to be conveyed under subsection (b)(1) is to be conveyed to a joint venture consisting of Koniag deficiency village corporations, Koniag 12(b) village corporations and Koniag, Inc. Provision is made, at the election of any of the Koniag Native corporations involved, to be represented in the joint venture by a wholly owned subsidiary corporation. The subsection prescribes the share each of the participants is to have in the joint venture. Simultaneously with the conveyance of the surface estate to the joint venture, the subsurface estate in the lands conveyed is to be conveyed to Koniag, Inc. Finally, the joint venture and the Native corporations involved are prohibited from taking or permitting actions inimical to bear denning activity on the Tonki Cape Peninsula on Afognak Island.

## APPENDIX G - 15

Subsection (d) provides the means of resolving a dispute between Ouzinkie Native Corporation and Koniag, Inc. on the one hand and the Kodiak Island Borough on the other, over rights to the land on Kodiak Island described in the subsection. The dispute would be resolved by requiring the Secretary of the Interior to convey the surface and subsurface estate of the lands on Afognak Island described in the subsection to Ouzinkie Native Corporation and Koniag, Inc. respectively, in the event Ouzinkie Native Corporation and Konaig, Inc. enter into an agreement to convey to the Kodiak Island Borough their interests in the described Kodiak Island land which the Kodiak Island Borough desires as watershed.

Subsection (e) will, when implemented, resolve in favor of the Native villages listed therein, all disputes concerning their eligibility for ANCSA benefits and prescribes limits upon the ANCSA land benefits to which these villages shall be entitled. The time limits stated in this and other subsections are intended to be directory rather than mandatory.

Subsection (f). The intent of the subsection is to assure the applicability of the provisions of the Alaska Native Claims Settlement Act to conveyances to Native corporations made under this section to the extent that such provisions would have been applicable were the conveyances made

## APPENDIX G - 16

pursuant to ANCSA. As one example, the applicability of otherwise applicable provisions of ANCSA are not to be affected by the fact that the conveyance provided for in subsection (c) is to be made to a joint venture rather than directly to the Alaska Native corporations that are the joint venturers.

Subsection (g) is a savings clause designed to preserve the rights of Koniag, Inc. to surface and subsurface estate on the Alaska Peninsula as therein provided.

Subsection (h) withdraws, subject to valid existing rights, public lands on Afognak Island to be conveyed to Native corporations within the Koniag region under this section, and provides for the opening of such lands, in the event any are not conveyed, to the extent the Secretary of the Interior deems appropriate.

Subsection (i). The rights of access and use of surface estate preserved for Koniag, Inc. under this subsection are restricted to the purposes of prospecting for, extraction and removal of subsurface resources retained under the section by Koniag, Inc. on the Alaska Peninsula. The rights of access and use preserved are those now provided for in existing regulations of the United States Fish and Wildlife Service (50 C.F.R. § 29.32) dealing with the rights of persons holding mineral interests in

## APPENDIX G - 17

lands conveyed to the United States for wildlife refuge purposes. These regulations do not provide for permits but set forth standards designed to minimize, so far as practicable, adverse impact on other surface values.

Subsection (j) deals with one of the incidents of the settlement of the village eligibility dispute which is the subject of subsection (e). Its effect is, with the minor exception therein provided for amounting at the most to 1920 acres, to preclude diminution of land allocations to other Alaska regional corporations under subsection 12(b) of ANCSA because of resolution of the village eligibility dispute.

Subsection (k) is a corollary of subsection (f). The first sentence of subsection (k) makes it clear that Koniag, Inc.'s interest in the timber resources of the joint venture is to be deemed Koniag's timber resources for purposes of applicability of the revenue sharing provisions of ANCSA section 7(i). Subsection (k) also sets out the rules for determining the portion of Koniag's share of the proceeds from the timber resources of the joint venture which is to be distributed under section 7(i).

Subsection (l). By subsection (l) Koniag, Inc. surrenders all of its subsurface mineral rights on the Alaska mainland other than for oil and gas (which is to be understood as including minerals, for

## APPENDIX G - 18

example, sulfur, found in solution or mixed with oil or gas) and sand and gravel used in prospecting for, extracting, storing and removing oil and gas in the event sand and gravel is judicially determined to be a part of subsurface estate as that term is used in ANCSA. This question is now in litigation before the United States Court of Appeals for the Ninth Circuit. Subsection (i) also restricts Koniag, Inc.'s exercise of its subsurface mineral rights similarly to the restriction effected by subsection (l) described above. In the event sand and gravel is determined to be an element of surface estate under ANCSA, subsection (l) requires the Secretary of the Interior to make available at fair market value, sand and gravel needed for oil and gas operations.

Subsection (m) incorporates within the Kodiak National Wildlife Refuge all remaining public lands on Afognak Island, including submerged lands below the line of mean high tide, within the present boundaries of the Chugach National Forest and not otherwise disposed of or dealt with in the section. It saves to the Native joint venture, however, the timber resources on two islands, Delphin and Discoverer, subject to management and harvest in accordance with management plans jointly developed between the joint venture and the Secretary of the Interior.

## APPENDIX G - 19

Subsection (n) is a savings clause designed to preserve existing Forest Service timber contracts and Forest Service cabin leases on Afognak Island.

### Section 303(5)

Section 303(5) conforms the boundaries of the Kodiak National Wildlife Refuge to the additions effected by the Koniag Amendment.

## APPENDIX G - 20

1/25/79

### KONIAG PROPOSAL

(Acreages based on protractions are approximate)

Acreage of Afognak Island	458,300
Less Koniag certified village land entitlements on Afognak	
A. Afognak Native Corp.	79,360
B. Ouzinkie Native. Corp.	25,600
C. Natives of Kodiak, Inc.	<u>22,000</u>
	- 126,960
Less other claims on Afognak Island land:	
A. State selections	4,130
B. Ouzinkie-Kodiak Borough Land Trade	<u>7,680</u>
	-11,738
Afognak acreage available for Koniag and Koniag certified village exchange, including Red Peaks	320,052

## APPENDIX G - 21

Less Red Peaks area (Remaining in federal ownership under Koniag land exchange)	- 40,460
Net Afognak acreage available to Koniag and Koniag certified villages under Koniag land exchange	<u>279,592</u>
<hr/>	
Koniag and Koniag certified villages entitlements on Alaska Peninsula	
A. Koniag, Inc. 14(h)(8)	52,531
B. Certified village deficiencies	199,860
C. Koniag 12(b)	<u>23,470</u> -340,861
Net Afognak acreage to Koniag and Koniag certified villages under Koniag land exchange.	-279,592
Total shortfall of available land on Afognak to satisfy Koniags and Koniag certified villages	

## APPENDIX G - 22

Mainland entitlements

61,269\*

\*Under the Koniag proposal, subsurface estate of 48,000 acres on the Alaska Peninsula (Drilling Block #1) will be retained under relinquished surface estate. Therefore, as to subsurface estate, the shortfall would be 13,269 (61,269 minus 48,000).

## **APPENDIX H**

### **Statutory provisions**

## APPENDIX H - 1

### **ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT, Pub.L.No. 96-487, 94 Stat. 2371**

#### **SEC. 102. DEFINITIONS.**

As used in this Act (except that in Titles XI and XIV the following terms shall have the same meaning as they have in the Alaska Native Claims Settlement Act, and the Alaska Statehood Act)--

\* \* \*

(7) The term "Regional Corporation" has the same meaning as such term has under section 3(g) of the Alaska Native Claims Settlement Act.

(8) The term "Village Corporation" has the same meaning as such term has under section 3 (j) of the Alaska Native Claims Settlement Act.

\* \* \*

#### **SEC. 1412. LIMITATIONS.**

Except as specifically provided in this Act, (i) the provisions of the Alaska Native Claims Settlement Act are fully applicable to this Act, and (ii) nothing in this Act shall be construed to alter or amend any of such provisions.

## APPENDIX H - 2

### **SEC. 1427. KONIAG VILLAGE AND REGIONAL CORPORATION LANDS.**

(a) As used in this section, the term--

(1) "Afognak Island" means Afognak Island, and Bear, Teck, Hogg, and Murphy Islands, above the line of mean high tide within the exterior boundaries of the Chugach National Forest. Murphy Island is that unnamed island shown on USGS Topographical Map, Scale 1:63360 entitled "Afognak B-2, 1952, Rev. 1967", lying in Seward Meridian, Alaska, Township 21 south, Range 19 west, that shares the common corner of sections 27, 28, 33, and 34.

(2) "Deficiency village acreage on the Alaska Peninsula" means the aggregate number of acres of public land to which "Koniag deficiency Village Corporations" are entitled, under §14(a) of the Alaska Native Claims Settlement Act, to a conveyance of the surface estate on account of deficiencies in available lands on Kodiak Island, and to which Koniag, Incorporated is entitled under §14(f) of that Act to conveyance of the subsurface estate.

(3) "12(b) acreage on the Alaska Peninsula" means the aggregate number of acres of public lands to which "Koniag 12(b) Village Corporations" are entitled under §14(a) of the Alaska Native Claims Settlement Act by reason of §12(b) of that

## APPENDIX H - 3

Act to conveyance of the surface estate and to which Koniag, Incorporated, under §14(g) of that Act, is entitled to conveyance of the subsurface estate, less the aggregate acreage of 12(b) lands on Kodiak Island as to which Koniag 12(b) Village Corporations will receive conveyances, the latter being estimated to be approximately fifteen thousand acres.

(4) "Koniag deficiency village corporation" means any or all of the following:

Afognak Native Corporation;  
Nu-Nachk-Pit, Incorporated;  
Ouzinkie Native Corporation; and  
Leisnoi, Incorporated.

(5) "Koniag 12(b) Village Corporation" means the village corporations listed in subparagraph (4) above, if within sixty days of the effective date of this Act, Koniag, Incorporated, by a resolution duly adopted by its Board of Directors, designates them as such as a class, and all of the following: Natives of Akhiok, Incorporated, Old Harbor Native Corporation, Kaguyak, Inc., Karluk Native Corporation and each of the corporations listed in subsection (e)(2) of this section which files a release as provided for in subsection (e)(1) of this section.

(6) "Koniag region" means the geographic area of Koniag, Incorporated, under the Alaska Native Claims Settlement Act.

## APPENDIX H - 4

(7) "Koniag village" means a Native village under the Alaska Native Claims Settlement Act which is within the Koniag region.

(8) "Koniag Village Corporation" means a corporation formed under §8 of the Alaska Native Claims Settlement Act to represent the Natives of a Koniag village and any Village Corporation listed in subsection (e)(2) of this section which has filed a release as provided in subsection (e)(1) of this section.

(9) "Koniag 14(h)(8) lands on the Alaska Peninsula" means the aggregate number of acres of public lands to which Koniag, Incorporated Regional Native Corporation is entitled under §14(h)(8) of the Alaska Native Claims Settlement Act, less the acreage of lands withdrawn for conveyance to that corporation by Public Land Order Numbered 5627 (42 F.R. 63170) and conveyed to that corporation.

(10) Any term defined in subsection 3(e) of the Alaska Native Claims Settlement Act has the meaning therein defined.

(11) "Alaska Peninsula" means the Alaska Peninsula and all islands adjacent thereto which are withdrawn pursuant to §11(a)(3) of the Alaska Native Claims Settlement Act for Koniag Village Corporations and Koniag, Incorporated, including but not limited to Sutwik, Hartman, Terrace,

## APPENDIX H - 5

Nakchamik, and West and East Channel Islands, except those islands selected by Koniag, Inc. pursuant to §15 of Public Law 94-204.

(b)(1) In full satisfaction of (A) the right of Koniag, Incorporated, Regional Native Corporation to conveyance of Koniag 14(h)(8) lands on the Alaska Peninsula under the Alaska Native Claims Settlement Act; (B) the right of each Koniag Deficiency Village Corporation to conveyance under that Act of the surface estate of deficiency village acreage on the Alaska Peninsula; (C) the right of each Koniag 12(b) Village Corporation to conveyance under the Alaska Native Claims Settlement Act of surface estate of 12(b) acreage on the Alaska Peninsula; (D) the right of Koniag, Incorporated under the Alaska Native Claims Settlement Act to conveyances of the subsurface estate of the deficiency village acreage on the Alaska Peninsula and of the 12(b) acreage on the Alaska Peninsula; and (E) the right of Koniag, Incorporated, to receive the minerals in the subsurface estates that, under subsection (g)(3) of this section and §12(a)(1) and §14(f) of the Alaska Native Claims Settlement Act, it will be conveyed on the Alaska Peninsula, other than oil and gas and sand and gravel that it will be conveyed as provided in subsection (1) of this section, and in lieu of conveyances thereof otherwise, the Secretary of the Interior shall, under the terms and conditions set forth in this section, convey as provided in subsection (c) of this section the surface estate of all

## APPENDIX H - 6

of the public lands on Afognak Island except those lands referred to in subparagraphs 2 (A), (B), (C), and (D) of this subsection, and simultaneously therewith, the Secretary shall, under the terms and conditions set forth in this section, convey the subsurface estate of such lands to Koniag, Incorporated.

\* \* \*

(3) All public lands on the Alaska Peninsula withdrawn pursuant to §11(a)(3) of the Alaska Native Claims Settlement Act for Koniag Village Corporations and for Koniag, Incorporated and all lands conveyed to such corporations subject to reconveyance to the United States upon enactment of this section; are hereby withdrawn, subject to valid existing rights and Native selection rights under that Act as modified by this Act, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from selection under the Alaska Statehood Act and shall remain so withdrawn subject to the provisions of §1203 of this Act. Following the filing with the Secretary of the Interior of (A) all resolutions pursuant to subparagraph (4) of this subsection, (B) the Joint venture agreement referred to in subsection (c) of this section (C) releases by such of the Koniag Village Corporations referred to in subsection (e)(2) of this section as file releases as provided in subsection (e)(1) of this section, and (D) all reconveyances of lands and interests in lands to the United States required by agreements with the Secretary of the Interior upon enactment of this

## APPENDIX H - 7

section- and upon the conveyances by the Secretary of the Interior of all public lands on Afognak Island to be conveyed as provided in subsection (c) of this section, all Native selection rights in and to public lands on the Alaska Peninsula withdrawn under §11(a)(3) of the Alaska Native Claims Settlement Act for Koniag Village Corporations and for Koniag, Incorporated, shall, except as provided in subsection (g) of this section, be extinguished and all claims thereto arising under this Act or the Alaska Native Claims Settlement Act shall be barred, and public lands (except as provided in subsection (g) of this section) shall be included within the Alaska Peninsula National Wildlife Refuge and administered accordingly.

(4) As a condition precedent to the conveyances provided for by subparagraph (1) of this subsection, Koniag, Incorporated, each Koniag Deficiency Village Corporation and each Koniag 12(b) Village Corporation shall file with the Secretary of the Interior resolutions duly adopted by their respective boards of directors accepting the conveyances provided for in this subsection as being in full satisfaction of their respective entitlements to conveyances of Koniag 14(h)(8) lands on the Alaska Peninsula, of deficiency village acreage on the Alaska Peninsula and of 12(b) acreage on the Alaska Peninsula, and Koniag, Incorporated, shall further file with the Secretary of the Interior a resolution duly adopted by its board of directors accepting the provisions of subsection (1) of this

## APPENDIX H - 8

section.

\* \* \*

(c) The Secretary of the Interior shall convey the surface estate on Afognak Island to be conveyed under subsection (b)(1) of this section to a joint venture providing for the development of the surface estate on Afognak Island to be conveyed under this subsection, consisting of the Koniag Deficiency Village Corporations, the Koniag 12(b) Village Corporations and Koniag, Incorporated (or wholly owned subsidiaries thereof), in which (1) the share of the Koniag Deficiency Village Corporations as a class in the costs and revenues of such joint venture is determined on the basis of a fraction, the numerator of which is the deficiency village acreage on the Alaska Peninsula and the denominator is the sum of the deficiency village acreage on the Alaska Peninsula plus the 12(b) acreage on the Alaska Peninsula plus the Koniag 14(h) acreage on the Alaska Peninsula, which fraction shall be multiplied by the number of acres on Afognak Island to be conveyed by reason of subparagraph (b)(1) of this subsection; (2) the share of the Koniag 12(b) Village Corporations as a class is determined on the basis of a fraction, the numerator of which is the 12(b) acreage on the Alaska Peninsula and the denominator of which is the denominator referred to in (1) above, which fraction shall be multiplied by the number of acres on Afognak Island referred to (1) above; and (3) the share of Koniag, Incorporated is determined on the basis of a fraction, the numerator of which is the Koniag 14(h) acreage on

## APPENDIX H - 9

the Alaska Peninsula and the denominator of which is the denominator referred to in (1) above which fraction shall be multiplied by the number of acres on Afognak Island to in (1) above. In such joint venture, each Koniag Deficiency Village Corporation shall participate in the share of the Koniag Deficiency Village Corporations as a class in the ratio that the entitlement of each to deficiency village acreage on the Alaska Peninsula bears to the total deficiency village acreage on the Alaska Peninsula and each Koniag 12(b) Village Corporation shall participate in the share of the Koniag 12(b) Village Corporations as a class in the ratio that the number of Natives enrolled under the Alaska Native Claims Settlement Act to the village that corporation represents bears to the number of Natives enrolled to all villages represented by Koniag 12(b) Village Corporations. The conveyance shall be made as soon as practicable after there has been filed with the Secretary of the Interior a duly executed joint venture agreement with provisions for sharing of and entitlements in costs and revenues of such venture as provided in this subsection. The conveyance shall not indicate the respective interests of each of the corporations in the surface estate conveyed but such interests shall be as provided in this subsection which shall be incorporated by reference into the conveyance. The subsurface estate in the foregoing lands shall be conveyed simultaneously to Koniag, Incorporated. Neither the joint venture, and Koniag Village Corporation having an interest in the joint venture

## APPENDIX H - 10

or the lands conveyed thereto, nor Koniag, Incorporated shall take or permit any action which may be inimical to bear denning activities on the Tonki Cape Peninsula.

\* \* \*

(e)(1) Each village listed in paragraph (2) of this subsection which, through the Koniag Village Corporation listed alongside it, files with the Secretary of the Interior, within sixty days from the effective date of this Act, a release duly authorized by its board of directors releasing, in consideration of the benefits provided for in this section, the United States, its officers, employees, and agents from all claims of the village and the Village Corporations to lands and interests therein arising under the Alaska Native Claims Settlement Act or compensation in any form therefor (except as provided in paragraph (3) of this subsection) along with a release by Koniag, Incorporated, duly authorized by its board of directors, releasing the United States, its officers, employees, and agents, from Koniag's claims to subsurface estate under the Alaska Native Claims Settlement Act arising out of the claims of such village or compensation in any form therefor (except as provided in paragraph (3) of this subsection) shall be deemed an eligible village under the Alaska Native Claims Settlement Act. This section shall be inoperative as to any such village which does not file such a release but shall be operative as to each of such villages which files such a release.

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(2) The villages and Koniag Village Corporations referred to in the foregoing paragraph are:

Anton Larsen Bay - Anton Larsen, Incorporated  
Bells Flats - Bells Flats Natives, Incorporated  
Uganik - Uganik Natives, Incorporated  
Litnik - Litnik, Incorporated  
Port William - Shuyak, Incorporated  
Ayakulik - Ayakulik, Incorporated  
Uyak - Uyak Natives, Incorporated

(3)(A) When Uyak Natives, Incorporated, Uganik Natives Incorporated, or Ayakulik, Incorporated (and Koniag, Incorporated in respect of such corporations) executes a release as provided for in paragraph (1) of this subsection, the Secretary of the Interior shall convey to each Village Corporation executing such release the surface estate of the one square mile of land excluded from the Kodiak Island National Wildlife Refuge by Public Land Order Numbered 1634 on account of the village it represents. The Secretary of the Interior shall by reason of conveyance of surface estate to a Village Corporation under this paragraph (3) convey to Koniag, Incorporated the subsurface estate in such lands.

(B) Upon conveyance of each Koniag Village Corporation of that land described in subparagraph (A), such Village Corporation shall comply with the requirements of subsection (f) of

## APPENDIX H - 12

this section except that it shall be required to convey twenty acres to the State in trust for any Municipal Corporation established in the Native village in the future for community expansion and appropriate rights of way for public use, and other foreseeable community needs.

(4) There shall vest in the Native Village Corporation representing each village that files a release as provided for in subsection (e)(1) of this section the right to all revenues received by Koniag, Incorporated from the Alaska Native Fund which would have been distributed to it by Koniag, Incorporated under subsections (j) and (k) of §7 of the Alaska Native Claims Settlement Act (subject to subsection (I) of §7 of that Act) had such village been determined to be eligible at the time of such distributions, less amounts heretofore paid by Koniag, Incorporated under subsection (m) of §7 of that Act to stockholders of such corporations as members of the class of at-large stockholders of Koniag, Incorporated. Each corporation representing a village that files a release as provided for in subsection (e)(1) of this section shall hereafter be entitled to share pro rata with all other Koniag Village Corporations in distributions of funds to Village Corporations made by Koniag, Incorporated out of funds hereafter received by Koniag, Incorporated from the Alaska Native Fund or from any other source and shall be eligible for all other rights and privileges to which Alaska Native Village Corporations are entitled under any

## APPENDIX H - 13

applicable laws, except as limited by this subsection. Nothing in this paragraph shall prohibit Koniag, Incorporated from withholding out of funds otherwise due a Village Corporation that files a release as provided for in subsection (e)(l) of this section, such sums as may be required to reimburse Koniag, Incorporated for an equitable portion of expenses incurred by Koniag Incorporated in connection with or arising out of the defense ~~or~~ assertion of the eligibility of the village represented by such corporation for benefits under the Alaska Native Claims Settlement Act including costs incident to land selection therefor.

(f) All conveyances made by reason of this section shall be subject to the terms and conditions of the Alaska Native Claims Settlement Act as if such conveyances (including patents) had been made or issued pursuant to that Act.

\* \* \*

## **ALASKA NATIVE CLAIMS SETTLEMENT ACT (43 U.S.C. § 1601 et seq.)**

### **43 U.S.C. § 1601. Congressional findings and declaration of policy**

Congress finds and declares that—

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- (a) there is an immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims;
- (b) the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska;

\* \* \*

## **43 U.S.C. § 1602. Definitions**

For the purposes of this chapter, the term—

- (a) “Secretary” means the Secretary of the Interior;
- (b) “Native” means a citizen of the United States who is a person of one-fourth degree or more Alaska Indian (including Tsimshian Indians not enrolled in the Metlakatla [1] Indian Community) Eskimo, or

## APPENDIX H - 15

Aleut blood, or combination thereof. The term includes any Native as so defined either or both of whose adoptive parents are not Natives. It also includes, in the absence of proof of a minimum blood quantum, any citizen of the United States who is regarded as an Alaska Native by the Native village or Native group of which he claims to be a member and whose father or mother is (or, if deceased, was) regarded as Native by any village or group. Any decision of the Secretary regarding eligibility for enrollment shall be final;

(c) "Native village" means any tribe, band, clan, group, village, community, or association in Alaska listed in sections 1610 and 1615 of this title, or which meets the requirements of this chapter, and which the Secretary determines was, on the 1970 census enumeration date (as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance), composed of twenty-five or more Natives;

\* \* \*

(j) "Village Corporation" means an Alaska Native Village Corporation organized under the laws of the State of Alaska as a business for profit or nonprofit corporation to hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and on behalf of a Native village in accordance with the terms of this chapter.

\* \* \*

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### **43 U.S.C. § 1603. Declaration of settlement**

**(a) Aboriginal title extinguishment through prior land and water area conveyances.** All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.

**(b) Aboriginal title and claim extinguishment where based on use and occupancy; submerged lands underneath inland and offshore water areas and hunting or fishing rights included.** All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.

**(c) Aboriginal claim extinguishment where based on right, title, use, or occupancy of land or water areas; domestic statute or treaty relating to use and occupancy; or foreign laws; pending claims.** All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that

## **APPENDIX H - 17**

are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

### **43 U.S.C. § 1607. Village Corporations**

**(a) Organization of Corporation prerequisite to receipt of patent to lands or benefits under Act.** The Native residents of each Native village entitled to receive lands and benefits under this chapter shall organize as a business for profit or nonprofit corporation under the laws of the State before the Native village may receive patent to lands or benefits under this chapter, except as otherwise provided.

\* \* \*

### **43 U.S.C. § 1610. Withdrawal of public lands**

**(a) Description of withdrawn public lands; exceptions; National Wildlife Refuge lands exception; time of withdrawal.** (1) The following public lands are withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from selection under the Alaska Statehood Act, as amended:

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(A) The lands in each township that encloses all or part of any Native village identified pursuant to subsection (b) of this section;

(B) The lands in each township that is contiguous to or corners on the township that encloses all or part of such Native village; and

(C) The lands in each township that is contiguous to or corners on a township containing lands withdrawn by paragraph (B) of this subsection.

The following lands are excepted from such withdrawal: lands in the National Park System and lands withdrawn or reserved for national defense purposes other than Naval Petroleum Reserve Numbered 4.

(2) All lands located within the townships described in subsection (a)(1) hereof that have been selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act are withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from the creation of third party interests by the State under the Alaska Statehood Act.

(3) (A) If the Secretary determines that the lands withdrawn by subsections (a)(1) and (2) hereof are insufficient to permit a Village or

## APPENDIX H - 19

Regional Corporation to select the acreage it is entitled to select, the Secretary shall withdraw three times the deficiency from the nearest unreserved, vacant and unappropriated public lands. In making this withdrawal the Secretary shall, insofar as possible, withdraw public lands of a character similar to those on which the village is located and in order of their proximity to the center of the Native village: Provided, That if the Secretary, pursuant to section 1616, and 1621 (e) of this title determines there is a need to expand the boundaries of a National Wildlife Refuge to replace any acreage selected in the Wildlife Refuge System by the Village Corporation the withdrawal under this section shall not include lands in the Refuge.

(B) The Secretary shall make the withdrawal provided for in subsection (3)(A) hereof on the basis of the best available information within sixty days of December 18, 1971, or as soon thereafter as practicable.

**(b) List of Native villages subject to chapter; review; eligibility for benefits; expiration of withdrawals for villages; alternative eligibility; eligibility of unlisted villages.** (1) The Native villages subject to this chapter are as follows:

### NAME OF PLACE AND REGION

\* \* \*

(2) Within two and one-half years from

## APPENDIX H - 20

December 18, 1971, the Secretary shall review all of the villages listed in subsection (b)(1) hereof, and a village shall not be eligible for land benefits under section 1613 (a) and (b) of this title, and any withdrawal for such village shall expire, if the Secretary determines that—

(A) less than twenty-five Natives were residents of the village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; or

(B) the village is of a modern and urban character, and the majority of the residents are non-Native.

Any Native group made ineligible by this subsection shall be considered under section 1613 (h) of this title.

(3) Native villages not listed in subsection (b)(1) hereof shall be eligible for land and benefits under this chapter and lands shall be withdrawn pursuant to this section if the Secretary within two and one-half years from December 18, 1971, determines that—

(A) twenty-five or more Natives were residents of an established village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who

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shall make findings of fact in each instance; and

(B) the village is not of a modern and urban character, and a majority of the residents are Natives.

### **43 U.S.C. § 1611. Native land selections**

**(a) Acreage limitation; proximity of selections and size of sections and units; waiver.** (1) During a period of three years from December 18, 1971, the Village Corporation for each Native village identified pursuant to section 1610 of this title shall select, in accordance with rules established by the Secretary, all of the township or townships in which any part of the village is located, plus an area that will make the total selection equal to the acreage to which the village is entitled under section 1613 of this title. The selection shall be made from lands withdrawn by section 1610 (a) of this title: Provided, That no Village Corporation may select more than 69,120 acres from lands withdrawn by section 1610 (a)(2) of this title, and not more than 69,120 acres from the National Wildlife Refuge System, and not more

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than 69,120 acres in a National Forest: Provided further, That when a Village Corporation selects the surface estate to lands within the National Wildlife Refuge System or Naval Petroleum Reserve Numbered 4, the Regional Corporation, for that region may select the subsurface estate in an equal acreage from other lands withdrawn in section 1610 (a) of this title within the region, if possible.

(2) Selections made under this subsection (a) of this section shall be contiguous and in reasonably compact tracts, except as separated by bodies of water or by lands which are unavailable for selection, and shall be in whole sections and, wherever feasible, in units of not less than 1,280 acres: Provided, That the Secretary in his discretion and upon the request of the concerned Village Corporation, may waive the whole section requirement where—

(A)(i) a portion of available public lands of a section is separated from other available public lands in the same section by lands unavailable for selection or by a meanderable body of water;

(ii) such waiver will not result in small isolated parcels of available public land remaining after conveyance of selected lands to Native Corporations; and

(iii) such waiver would result in a better land ownership pattern or improved land or

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resource management opportunity; or

(B) the remaining available public lands in the section have been selected and will be conveyed to another Native Corporation under this chapter.

\* \* \*

### **43 U.S.C. § 1613. Conveyance of lands**

**(a) Native villages listed in section 1610 and qualified for land benefits; patents for surface estates; issuance; acreage.** Immediately after selection by a Village Corporation for a Native village listed in section 1610 of this title which the Secretary finds is qualified for land benefits under this chapter, the Secretary shall issue to the Village Corporation a patent to the surface estate in the number of acres shown in the following table:

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If the village had on the 1970 census enumeration date a Native population between—	It shall be entitled to a patent to an area of public lands equal to—
25 and 99	69,120 acres.
100 and 199	92,160 acres.
200 and 399	115,200 acres.
400 and 599	138,240 acres.
600 or more	161,280 acres.

The lands patented shall be those selected by the Village Corporation pursuant to section 1611 (a) of this title. In addition, the Secretary shall issue to the Village Corporation a patent to the surface estate in the lands selected pursuant to section 1611 (b) of this title.

**(b) Native villages listed in section 1615 and qualified for land benefits; patents for surface estates; issuance; acreage.** Immediately after selection by any Village Corporation for a Native village listed in section 1615 of this title which the Secretary finds is qualified for land benefits under this chapter, the Secretary shall issue to the Village Corporation a patent to the surface estate to 23,040 acres. The lands patented shall be the lands within the township or townships that enclose the Native

## APPENDIX H - 25

village, and any additional lands selected by the Village Corporation from the surrounding townships withdrawn for the Native village by section 1615 (a) of this title.

\*\*\*

**43 U.S.C. § 1632. Statute of limitations on decisions of Secretary and reconveyance of land by Village Corporation.** (a) Except for administrative determinations of navigability for purposes of determining ownership of submerged lands under the Submerged Lands Act [43 U.S.C. 1301 et seq., 1311 et seq.], a decision of the Secretary under this chapter or the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.] shall not be subject to judicial review unless such action is initiated before a court of competent jurisdiction within two years after the day the Secretary's decision becomes final or December 2, 1980, whichever is later: Provided, That the party seeking such review shall first exhaust any administrative appeal rights.

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### **Section 1(c) of the Act of Jan. 2, 1976, P.L. 92-204, 89 Stat. 1145**

(c) In those instances where, on the roll prepared under section 5 of the Settlement Act, there were enrolled as residents of a place on April 1, 1970, a sufficient number of Natives required for a Native village or Native group, as the case may be, and it is subsequently and finally determined that such place is not eligible for land benefits under the Act on grounds which include a lack of sufficient number of residents, the Secretary shall, in accordance with the criteria for residence applied in the final determination of eligibility, redetermine the place of residence on April 1, 1970, of each Native enrolled to such place, and the place of residence as so redetermined shall be such Native's place of residence on April 1, 1970, for all purposes under the Settlement Act: *Provided*, That each Native whose place of residence on April 1, 1970, is changed by reason of this subsection shall be issued stock in the Native corporation or corporations in which such redetermination entitles him to membership and all stock issued to such Native by any Native Corporation in which he is no longer eligible for membership shall be deemed canceled: *Provided further*, That no redistribution of funds made by any Native Corporation on the basis of prior places of residence shall be affected: *Provided further*, That land entitlements of any Native

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village, Native group, Village Corporation, Regional Corporation, or corporations organized by Natives residing in Sitka, Kenai, Juneau, or Kodiak, all as defined in said Act, shall not be affected by any determination of residence made pursuant to this subsection, and no tribe, band, clan, group, village community, or association not otherwise eligible for land or other benefits as a 'Native group' as defined in said Act, shall become eligible for land or other benefits as a Native group because of any redetermination of residence pursuant to this subsection: *Provided further*, That any distribution of funds from the Alaska Native Fund pursuant to subsection (c) of section 6 of the Settlement Act made by the Secretary or his delegate prior to any redetermination of residency shall not be affected by the provisions of this subsection. Each Native whose place of residence is subject to redetermination as provided in this subsection shall be given notice and an opportunity for hearing in connection with such redetermination as shall any Native Corporation which it appears may gain or lose stockholders by reason of such redetermination of residence.

### **43 C.F.R. § 2651.2 Eligibility requirements.**

(a) Pursuant to sections 11(b) and 16(a) of the Act, the Director, Juneau Area Office, Bureau of Indian Affairs, shall review and make a determination, not later than December 19, 1973, as to which villages

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are eligible for benefits under the Act.

(1) *Review of listed native villages.* The Director, Juneau Area Office, Bureau of Indian Affairs, shall make a determination of the eligibility of villages listed in section 11(b)(1) and 16(a) of the Act. He shall investigate and examine available records and evidence that may have a bearing on the character of the village and its eligibility pursuant to paragraph (b) of this section.

(2) *Findings of fact and notice of proposed decision.* After completion of the investigation and examination of records and evidence with respect to the eligibility of a village listed in sections 11(b)(1) and 16(a) of the Act for land benefits, the Director, Juneau Area Office, Bureau of Indian Affairs, shall publish in the Federal Register and in one or more newspapers of general circulation in Alaska his proposed decision with respect to such eligibility and shall mail a copy of the proposed decision to the affected village, all villages located in the region in which the affected village is located, all Regional Corporations within the State of Alaska and the State of Alaska. His proposed decision is subject to protest by any interested party within 30 days of the publication of the proposed decision in the Federal Register. If no valid protest is received within the 30-day period, such proposed decision shall become final and shall be published in the Federal Register. If the final decision is in favor of a listed village, the Director, Juneau Area Office,

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Bureau of Indian Affairs, shall issue a certificate as to the eligibility of the village in question for land benefits under the Act, and certify the record and the decision to the Secretary. Copies of the final decisions and certificates of village eligibility shall be mailed to the affected village, all villages located in the region in which the affected village is located, all Regional Corporations within the State of Alaska, and the state of Alaska.

(3) *Protest.* Within 30 days from the date of publication of the proposed decision in the Federal Register, any interested party may protest a proposed decision as to the eligibility of a village. No protest shall be considered which is not accompanied by supporting evidence. The protest shall be mailed to the Director, Juneau Area Office, Bureau of Indian Affairs.

(4) *Action on protest.* Upon receipt of a protest, the Director, Juneau Area Office, Bureau of Indian Affairs, shall examine and evaluate the protest and supporting evidence required herein, together with his record of findings of fact and proposed decision, and shall render a decision on the eligibility of the Native village that is the subject of the protest. Such decision shall be rendered within 30 days from the receipt of the protest and supporting evidence by the Director, Juneau Area Office, Bureau of Indian Affairs. The decision of the Director, Juneau Area Office, Bureau of Indian Affairs, shall be published in the Federal Register and in one or

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more newspapers of general circulation in the State of Alaska and a copy of the decision and findings of fact upon which the decision is based shall be mailed to the affected village, all villages located in the region in which the affected village is located, all Regional Corporations within the State of Alaska, the State of Alaska, and any other party of record. Such decision shall become final unless appealed to the Secretary by a notice filed within 30 days of its publication in the Federal Register in accordance with the regulations governing appeals set out in 43 CFR part 4, subpart E.

(5) *Action on appeals.* Appeals shall be made to the Board of Land Appeals in accordance with subpart E of part 4 of this title. Decisions of the Board on village eligibility appeals are not final until personally approved by the Secretary.

(6) *Applications by unlisted villages for determination of eligibility.* The head or any authorized subordinate officer of a Native village not listed in section 11(b) of the Act may file on behalf of the unlisted village an application for a determination of its eligibility for land benefits under the Act. Such application shall be filed in duplicate with the Director, Juneau Area Office, Bureau of Indian Affairs, prior to September 1, 1973. If the application does not constitute prima facie evidence of compliance with the requirements of paragraph (b) of this section, he shall return the application to the party filing the same with a

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statement of reasons for return of the application, but such filing, even if returned, shall constitute timely filing of the application. The Director, Juneau Area Office, Bureau of Indian Affairs, shall immediately forward an application which appears to meet the criteria for eligibility to the appropriate office of the Bureau of Land Management for filing. Each application must identify the township or townships in which the Native village is located.

(7) *Segregation of land.* The receipt of the selection application for filing by the Bureau of Land Management shall operate to segregate the lands in the vicinity of the village as provided in sections 11(a)(1) and (2) of the Act.

(8) *Action on application for eligibility.* Upon receipt of an application which appears to meet the criteria for eligibility, the Director, Juneau Area Office, Bureau of Indian Affairs, shall have a notice of the filing of the application published in the Federal Register and in one or more newspapers of general circulation in Alaska and shall promptly review the statements contained in the application. He shall investigate and examine available records and evidence that may have a bearing on the character of the village and its eligibility pursuant to this Subpart 2651, and thereafter make findings of fact as to the character of the village. No later than December 19, 1973, the Director, Juneau Area Office, Bureau of Indian Affairs, shall make a determination as to the eligibility of the village as

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a Native village for land benefits under the Act and shall issue a decision. He shall publish his decision in the Federal Register and in one or more newspapers of general circulation in Alaska and shall mail a copy of the decision to the representative or representatives of the village, all villages in the region in which the village is located, all Regional Corporations, and the State of Alaska.

(9) *Protest to eligibility determination.* Any interested party may protest a decision of the Director, Juneau Area Office, Bureau of Indian Affairs, regarding the eligibility of a Native village for land benefits under the provisions of sections 11(b)(3)(A) and (B) of the Act by filing a notice of protest with the Director, Juneau Area Office, Bureau of Indian Affairs, within 30 days from the date of publication of the decision in the Federal Register. A copy of the protest must be mailed to the representative or representatives of the village, all villages in the region in which the village is located, all Regional Corporations within Alaska, the State of Alaska, and any other parties of record. If no protest is received within the 30-day period, the decision shall become final and the Director, Juneau Area Office, Bureau of Indian Affairs, shall certify the record and the decision to the Secretary. No protest shall be considered which is not accompanied by supporting evidence. Anyone protesting a decision concerning the eligibility or ineligibility of an unlisted Native village shall have the burden of proof in establishing that the decision

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is incorrect. Anyone appealing a decision concerning the eligibility or ineligibility of an unlisted Native village shall have the burden of proof in establishing that the decision is incorrect.

(10) *Action on protest appeal.* Upon receipt of a protest, the Director, Juneau Area Office, Bureau of Indian Affairs, shall follow the procedure outlined in paragraph (a)(4) of this section. If an appeal is taken from a decision on eligibility, the provisions of paragraph (a)(5) of this section shall apply.

(b) Except as provided in paragraph (b)(4) of this section, villages must meet each of the following criteria to be eligible for benefits under sections 14(a) and (b) of the Act:

(1) There must be 25 or more Native residents of the village on April 1, 1970, as shown by the census or other evidence satisfactory to the Secretary. A Native properly enrolled to the village shall be deemed a resident of the village.

(2) The village shall have had on April 1, 1970, an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and life style and at least 13 persons who enrolled thereto must have used the village during 1970 as a place where they actually lived for a period of time: Provided, That no village which is known as a traditional village shall be disqualified if it meets the other criteria specified in this

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subsection by reason of having been temporarily unoccupied in 1970 because of an act of God or government authority occurring within the preceding 10 years.

(3) The village must not be modern and urban in character. A village will be considered to be of modern and urban character if the Secretary determines that it possessed all the following attributes as of April 1, 1970:

- (i) Population over 600.
- (ii) A centralized water system and sewage system that serves a majority of the residents.
- (iii) Five or more business establishments which provide goods or services such as transient accommodations or eating establishments, specialty retail stores, plumbing and electrical services, etc.
- (iv) Organized police and fire protection.
- (v) Resident medical and dental services, other than those provided by Indian Health Service.
- (vi) Improved streets and sidewalks maintained on a year-round basis.

(4) In the case of unlisted villages, a majority of the residents must be Native, but in the case of s listed in sections 11 and 16 of the Act, a majority of the residents must be Native only if the determination is made that the village is modern and urban pursuant to paragraph (b)(3) of this section.

# **OPPOSITION BRIEF**

11 (2) No. 08-863

Supreme Court, U.S.

FILED

JAN 15 2009

OFFICE OF THE CLERK

In The  
Supreme Court of the United States

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OMAR STRATMAN,

*Petitioner,*

v.

DIRK KEMPTHORNE,  
SECRETARY OF THE INTERIOR;  
LEISNOI, INC.;  
KONIAG, INC.,

*Respondents.*

---

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit

---

**OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI**

---

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## **CORPORATE DISCLOSURE STATEMENT**

Leisnoi, Inc. is an Alaska Native Village Corporation. It has no parent corporation(s). No publicly traded corporation owns more than 10% of its stock.

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## INTRODUCTION

This Court should refuse Omar Stratman's application for a writ of *certiorari* to review the October 6, 2008 judgment by the United States Court of Appeals for the Ninth Circuit because federal courts lack subject matter jurisdiction to entertain this 2002 suit by Omar Stratman. This Court need not reach the statutory construction issue presented at page ii of the petition for *certiorari* because subject matter jurisdiction is absent.

If Mr. Stratman wished to challenge the September 9, 1974 village eligibility decision [ER 304] by Secretary of the Interior Rogers C.B. Morton declaring the Native Village of Woody Island eligible for benefits under the Alaska Native Claims Settlement Act ("ANCSA"), then Petitioner should have, but failed, to appeal from the November 21, 1995 Final Judgment [ER 230] dismissing Civil Action No. A76-132, his so-called "decertification suit."

Likewise, if Mr. Stratman had wished to challenge the December 20, 2006 decision [Appendix C] by Secretary of the Interior Dirk Kempthorne declaring that Congress ratified the 1974 eligibility decision of his predecessor through enactment of section 1427 of the Alaska National Interests Lands Conservation Act ("ANILCA"), then Petitioner should have, but failed, to file suit challenging it within two years after the day Secretary Kempthorne issued his decision. The present action before this Court on petition for *certiorari* was commenced on November 29, 2002

challenging non-final agency action, an Interior Board of Land Appeals (“IBLA”) panel decision dated October 29, 2002 [ER 103] that was subject to mandatory Secretarial review per 43 CFR § 2651.2(a)(2). Petitioner’s third amended complaint [ER 137], which purported to complain about the December 20, 2006 decision by Secretary Kempthorne, is a nullity because subject matter jurisdiction was lacking over the case when first initiated in 2002.

The district court never addressed most of the jurisdictional defects Leisnoi had demonstrated in its series of Rule 12(b)(1) motions to dismiss, including the argument that the suit had been prematurely filed challenging non-final agency action, because the court found it unnecessary to address these arguments after it concluded subject matter jurisdiction was absent on the basis of ANILCA having mooted Petitioner’s claims. [ER 150, Appendix B-18]. This Court need not grant *certiorari* to address the ANILCA issue because subject matter jurisdiction is absent for a host of other reasons.

Subject matter jurisdiction is lacking because:

- (i) the present suit was filed in 2002 impermissibly challenging non-final agency action;
- (ii) the petitioner failed to exhaust his available administrative remedies by neglecting to appeal the IBLA panel ruling to the

Secretary of the Interior and await the Secretarial review before filing suit;

(iii) the two-year ANILCA section 902 [43 U.S.C. § 1632(a)] **statute of limitations has lapsed** in which Stratman could challenge either Secretary of the Interior Rogers C.B. Morton's 1974 village eligibility decision in favor of the Native Village of Woody Island [ER 304] and/or Secretary of the Interior Dirk Kempthorne's December 20, 2006 ruling [Appendix C] affirming the 1974 eligibility decision;

(iv) **Stratman lacks administrative standing** required by 43 CFR 4.410(a), (d), and/or (e) to pursue a challenge to Woody Island's eligibility because the record reflects he holds no "property interest" or "cognizable interest" that was "adversely affected" by Woody Island's certification, and the agency expressly determined that Petitioner "lack[s] the necessary standing to bring an appeal", *In the Matter of Leisnoi, Inc., Appeal of Omar Stratman*;<sup>1</sup>

(v) **Stratman lacks judicial standing** because he admits [ER 406] having no property interest affected by Woody Island's certification, and he failed to introduce any evidence of having made recreational use of Leisnoi's land;

(vi) the doctrine of **administrative finality** attaches to the March 24, 1978 decision against Omar Stratman, *In the Matter of Leisnoi, Inc.*,

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<sup>1</sup> ANCAB No. LS 77-4C, March 24, 1978 Decision and Order of Dismissal, [ER 323]

*Appeal of Omar Stratman*<sup>2</sup>, and bars Stratman from relitigating his claim challenging Woody Island's eligibility that he litigated and lost therein, then failed to appeal; and

(vii) **collateral estoppel** bars Stratman from relitigating the issue of Woody Island's eligibility that the Alaska Native Claims Appeal Board ("ANCAB") decided on the merits in its final decision in favor of Woody Island, *In re Woody Island*, ANCAB No. VE 74-65 (Aug. 28, 1974) [ER 303], from which no appeal was taken.

For the convenience of the Court, and to avoid repetition, Leisnoi will focus this opposition to the application for *certiorari* on the significant jurisdictional defects that plague Petitioner's case, leaving to the Secretary and to Koniag, Inc. most of the briefing on ANILCA ratification and other factors that militate against issuance of *certiorari*, which arguments Leisnoi adopts.

## **STATEMENT OF THE CASE**

In 1974, the Bureau of Indian Affairs ("BIA") determined [ER 278], the Alaska Native Claims Appeal Board held,<sup>3</sup> and Secretary of the Interior Morton agreed [ER 304], that the Native Village of Woody Island qualifies for benefits under the Alaska Native Claims Settlement Act.

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<sup>2</sup> ANCAB No. LS 77-4C, March 24, 1978 Order of Dismissal [ER 318 -324].

<sup>3</sup> *In re Woody Island*, ANCAB No. VE 74-65 [ER 303].

On January 19, 1977, the BIA made its *Finding of Entitlement Pursuant to Section 14(a) of the Alaska Native Claims Settlement Act*, determining that "Leisnoi, Inc.", the ANCSA corporation for the village, is "an eligible village corporation" that is "entitled to a patent" of 115,200 acres, and published this Finding in the February 2, 1977 Federal Register, Volume 42, No. 22, pages 6419-26 [ER 306-13].

Kodiak cattle rancher Omar Stratman appealed this Finding to the Alaska Native Claims Appeal Board [ER 314]. In his April 26, 1977 Statement of Reasons for Appeal to the ANCAB [ER 316-17], Stratman argued that

"the number of Native residents for Leisnoi, Inc. shown to be eligible for the purposes of computing entitlements to Federal lands is erroneous. Information and evidence in the possession of the appellants indicate that the number of Natives residing in the village upon the date specified in the Alaska Native Claims Settlement Act was zero....[T]here were no Native residents as required by the statute to provide eligibility."

The ANCAB rejected this argument, and ruled in favor of Leisnoi, Inc. on March 24, 1978 *In the Matter of Leisnoi, Inc., Appeal of Omar Stratman*, ANCAB No. LS 77-4C, declaring that

"Leisnoi has been found to be eligible as a village under § 11 of ANCSA.... [A] determination of eligibility is a finding that such village had at least a minimum Native population of 25 on the 1970 census enumeration date."<sup>4</sup> The ANCAB also held that Stratman has no administrative standing to challenge Leisnoi's entitlement to ANCSA benefits because he holds no property interest that would be adversely affected by the agency decision in favor of Leisnoi [ER 321-23].

Stratman could have appealed to federal district court from the March 24, 1978 ANCAB final ruling against him, and moved to consolidate it with his 1976 so-called "decertification suit" he was then pursuing [ER 194], but he failed to do so, instead leaving the fetid corpse of his failed ANCAB challenge to rot, and become the skeleton in his litigation closet.

Stratman abandoned all allegations of fraud on January 5, 1977 [ER 194].<sup>5</sup> He then pursued his 1976 decertification case on and off for many years, dropping the case when he thought he could get land or money for doing so.<sup>6</sup>

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<sup>4</sup> *In the Matter of Leisnoi, Inc., Appeal of Omar Stratman*, ANCAB No. LS 77-4C, Decision and Order of Dismissal dated March 24, 1978 at page 5 [ER 322].

<sup>5</sup> Petitioner's effort to resurrect in a January 5, 2009 petition for certiorari allegations of fraud that he formally abandoned exactly 32 years ago, on January 5, 1977, is ineffective.

<sup>6</sup> Petitioner at one time contended that a settlement agreement he entered into with regional corporation

The District Court for the District of Alaska ultimately decided, in 1995, to send the Woody Island eligibility dispute over to the Department of the Interior for agency review [ER 226-28].<sup>7</sup> One of the issues referred for agency consideration was whether Congressional enactment in 1980 of the Alaska National Interests Lands Conservation Act ratified the Department of the Interior's finding that the Native Village of Woody Island is eligible for ANCSA benefits [ER 227]. The district judge entered a Final Judgment in November 1995 [ER 230], dismissing the 1976 suit and referring the matter for agency review.

The 1995 judgment [ER 230] did not decertify Woody Island as Stratman had requested in his 1976 complaint, and the judgment dismissed

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Koniag, Inc. somehow applied to village corporation Leisnoi, Inc. He pursued claims to that effect in state court, but the Alaska Supreme Court ruled against him in *Leisnoi, Inc. v. Stratman*, 835 P.2d 1202 (Alaska 1992). After failing in that endeavor to line his pockets, he reopened the 1976 case and continued to dog Leisnoi with litigation.

<sup>7</sup> The district court determined "this appears to be a perfect case to read ripeness and primary jurisdiction together to require that Stratman litigate his challenge to Leisnoi before the agency before he brings it here. The agency in the first instance should determine whether Leisnoi is a phantom of the Secretary's imagination, as Stratman contends, or as its members contend, the modern representative of an ancient people, the victim of an itinerant berry picker. Sending the issue back will permit the agency to exercise its expertise." [ER 227].

rather than merely stayed his suit; yet, Stratman failed to appeal the judgment. Instead, he pursued an interlocutory appeal from the denial of a motion for preliminary injunction in which he was trying to choke the small Native Village Corporation by freezing its bank accounts and halting its timber harvesting operations. The United States Court of Appeals for the Ninth Circuit dismissed that interlocutory appeal for lack of subject matter jurisdiction in 1996, because the district court had already entered a Final Judgment in 1995 terminating the 1976 civil action.<sup>8</sup>

After two weeks of hearings, followed by years of briefing at multiple levels of the Department of the Interior, Secretary of the Interior Kempthorne decided the matter in favor of Leisnoi, Inc. and against Petitioner on December 20, 2006 [ER 122]. The Secretary determined that Congress ratified his predecessor's 1974 eligibility determination in favor of Woody Island by legislating in ANILCA that Woody Island's Native Village Corporation, Leisnoi, Inc., has a "right" to ANCSA conveyances [ER 122-36].

In the meantime, however, four years before the Secretary ruled, Stratman had filed a new suit, on November 29, 2002, Civil Action No. A02-0290 [ER 162], this case now on petition for *certiorari*, claiming once again that Woody Island is ineligible for ANCSA benefits although Congress has declared otherwise. The district court stayed the

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<sup>8</sup> *Stratman v. Babbitt*, Ninth Circuit Case No. 95-35376, 1996 U.S. App. LEXIS 10946 (9<sup>th</sup> Cir. 1996) [ER 391].

case for more than three years while awaiting the Secretary's decision [ER 164].<sup>9</sup>

On December 20, 2006, Secretary Kempthorne issued his long-awaited ruling in favor of Leisnoi, Inc. and against Omar Stratman [ER 122]. The district court then lifted the stay and set a deadline in which Mr. Stratman could amend his complaint [ER 171, docket entry #103]. Stratman amended his complaint [ER 137], purporting to challenge Secretary Kempthorne's ruling [Appendix C]. Leisnoi promptly filed a series of Rule 12(b)(1) motions to dismiss detailing multiple reasons why federal subject matter jurisdiction is absent [ER

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<sup>9</sup> At district court docket #65, long before the Secretary ruled, Leisnoi notified the district court that subject matter jurisdiction was lacking because the 2002 suit was filed before the Secretary had reviewed the IBLA panel decision:

"This Court should reject Stratman's theory that he can file a new suit, prematurely, before the agency has completed its review.... Stratman took a premature appeal from an interlocutory ruling by the IBLA, a ruling not yet reviewed by Secretary Norton.... Until such time as the Department of the Interior completes its review, with a final decision having been issued by the Secretary, it is premature for Stratman to be back in federal court.... Until the agency completes its review, there is no jurisdiction in federal court to challenge the agency action...."

171-174, docket entries ##107, 109, 111, 118, 120].<sup>10</sup>

On September 26, 2007, the Honorable James Singleton agreed with Secretary Kempthorne that ANILCA ratified Secretary Morton's 1974 eligibility determination, thereby mooted Stratman's case and depriving the federal court of subject matter jurisdiction [ER 150-58].<sup>11</sup> Stratman appealed that ruling to the United States Court of Appeals for the Ninth Circuit [ER 160].

On October 6, 2008, the Ninth Circuit agreed with Secretary Kempthorne and District Judge Singleton that ANILCA ratified Secretary Morton's 1974 eligibility determination in favor of the Native

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<sup>10</sup> One of the multiple reasons Leisnoi presented to the district court for Rule 12(b)(1) dismissal was that "Stratman filed suit in 2002, prematurely trying to challenge non-final agency action, without subject matter jurisdiction." [District court docket #110 at page 4]. Leisnoi renewed this argument with the Court of Appeals at page 7 of its Appellee's Brief.

<sup>11</sup> "The Court concludes that the Secretary's interpretation was not only permissible, but persuasive. Although the Court finds that the Secretary's interpretation must be upheld under *Chevron* deference, the Court notes that it would have come to the same conclusion had it been interpreting the statute in the first instance, or under the persuasive deference standard found in *Skidmore*.... Stratman's challenge to Leisnoi's eligibility is moot. As this Court lacks subject matter jurisdiction, [Leisnoi, Inc.'s] Motion to dismiss at Docket No. 120 is GRANTED." September 26, 2007 order granting Leisnoi, Inc.'s motion to dismiss Petitioner's 2002 case for lack of subject matter jurisdiction [ER 150, Appendix B-16 to B-17].

Village of Woody Island, and thus mooted Stratman's village eligibility challenge [Appendix A]. Omar Stratman did not seek rehearing *en banc*, instead petitioning this Court on January 5, 2009 for a writ of *certiorari*.

## **STATEMENT OF THE ISSUES**

1. Petitioner did not institute this 2002 suit within two years of either the 1974 eligibility decision in favor of Woody Island [ER 304], or the December 2, 1980 effective date of ANILCA. Does the two-year statute of limitations in ANILCA § 902 bar judicial review of Secretary Morton's 1974 decision?
2. The time has lapsed under § 902 in which Stratman could challenge the underlying 1974 eligibility decision itself. Accordingly, would it be a moot point for the Supreme Court to decide whether Congress in 1980 ratified that eligibility decision?
3. Federal courts can review challenges to final agency action pursuant to the Administrative Procedures Act, 5 U.S.C. § 704. Village eligibility decisions of the Interior Board of Land Appeals "are not final until personally approved by the Secretary." 43 CFR § 2651.2(a)(5). Was the IBLA's October 29, 2002 decision [Appendix D] on the eligibility of the Native Village of Woody Island a final agency decision that could be challenged in federal court without awaiting Secretarial review?

4. ANILCA section 902 [43 U.S.C. § 1632(a)] mandates that before suit is filed challenging decisions made by the Department of the Interior under ANCSA, “*Provided*, That the party seeking such review shall first exhaust any administrative appeal rights.” The October 29, 2002 IBLA panel ruling could be appealed to the Secretary of the Interior pursuant to 43 CFR § 2651.2(a)(5). Did the federal courts have subject matter jurisdiction when Stratman filed suit in 2002 challenging the IBLA panel ruling without having first exhausted administrative appeal rights?
5. In order to have administrative standing to appeal a Department of the Interior decision relating to ANCSA, the protestant is required to prove he holds a “property interest” and/or a “legally cognizable interest” that would be “adversely affected” by the agency action. 43 CFR § 4.410. Petitioner concedes [ER 406] he holds no property interest in land that the United States patented to Leisnoi, and he failed to present any evidence that the eligibility of Woody Island in any way adversely affects a legally cognizable interest held by him. Does Mr. Stratman have administrative standing to appeal the decision that Woody Island is eligible for ANCSA benefits?
6. Constitutional judicial standing can extend as far as those who have mere recreational interests to protect. But at the hearings conducted by the Department of the Interior

on protestant Stratman's challenge in August 1998, in the lower courts, and in his petition for *certiorari*, Stratman presented no evidence of having ever made recreational use of land selected by or patented to Leisnoi, Inc. Has Stratman established judicial standing to petition this Court for *certiorari*?

7. The doctrine of administrative finality bars, in a subsequent litigation, reconsideration of earlier administrative proceedings which were or could have been subject to direct review. Stratman failed to appeal from the ANCAB's March 24, 1978 Order of Dismissal of his administrative challenge, *In the Matter of Leisnoi, Inc., Appeal of Omar Stratman*, ANCAB No. LS 77-4C. [ER 318] Does the doctrine of administrative finality bar Stratman, some 30 years after the ANCAB's order of dismissal, from suing to challenge the factual underpinnings of that ruling?
8. The doctrine of collateral estoppel prevents relitigation of issues actually litigated and necessarily decided, after a full and fair opportunity for litigation, in a prior proceeding. The August 28, 1974 ANCAB final decision, *In re Woody Island*, ANCAB # VE 74-65 [ER 303], approved by Secretary of the Interior Rogers C.B. Morton on September 9, 1974 [ER 304], determined that the Native Village of Woody Island is eligible for benefits under ANCSA. No appeal was taken from that final decision. Does the doctrine of collateral estoppel bar

re-litigation of the same eligibility issue once again, more than 30 years after the final ruling was entered deciding this issue in favor of the Native Village of Woody Island?

## **ARGUMENT**

### **I. FEDERAL SUBJECT MATTER JURISDICTION IS LACKING BECAUSE PETITIONER FILED HIS 2002 ACTION PREMATURELY, CHALLENGING NON-FINAL AGENCY ACTION, WITHOUT HAVING EXHAUSTED ADMINISTRATIVE APPEAL RIGHTS TO SUPERIOR AGENCY AUTHORITY**

This Court should deny *certiorari* because there exists no federal subject matter jurisdiction to entertain this 2002 suit contesting the eligibility of the Native Village of Woody Island. Mr. Stratman filed this suit prematurely, challenging non-final agency action by the Interior Board of Land Appeals. He failed first to exhaust administrative appeal rights by appealing the IBLA panel ruling to the Secretary of the Interior and awaiting a Secretarial decision before bringing suit.

#### **1. Lack of final agency action before Petitioner filed suit in 2002**

The Administrative Procedures Act allows appeals to federal court from "final agency action."<sup>12</sup> But the IBLA panel ruling of October 29,

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<sup>12</sup> Section 10(c) of the Administrative Procedures Act, 5 U.S.C. § 704.

2002 [ER 103] was not final agency action because it had not been personally approved by the Secretary of the Interior.

Secretarial review of village eligibility decisions is mandatory under 43 CFR § 2651.2(a)(5): “Decisions of the Board [Interior Board of Land Appeals] on village eligibility appeals are **not final until personally approved by the Secretary.**” (emphasis added) Secretary Kempthorne specifically noted the mandatory nature of his review in his December 20, 2006 ruling, observing that Secretarial “review of IBLA’s decision is mandatory pursuant to 43 C.F.R. § 2651.2(a)(5).” [ER 125]<sup>13</sup>

There exists no federal subject matter jurisdiction for the federal courts to entertain suits such as this one that sought to challenge non-final agency action.

## 2. Failure to exhaust administrative remedies before filing suit in federal court in 2002

Jurisdiction is also lacking because Mr. Stratman failed to exhaust his administrative remedies before bringing the 2002 suit. This doctrine of exhaustion is “related but distinct” from the finality requirement. *Clouser v. Espy.*<sup>14</sup>

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<sup>13</sup> Under this regulation, “the Secretary reserved to himself the ultimate decision in each case.” *Koniag, Inc. v. Kleppe*, 405 F.Supp. 1360, 1367 (D.D.C. 1974), *affd* 580 F.2d 601 (U.S.App.D.C.), *cert. denied*, 439 U.S. 1052 (1978).

<sup>14</sup> 42 F.3d 1522, 1532 (9<sup>th</sup> Cir.1994).

This Court recognized in *Darby v. Cisneros*<sup>15</sup> that an appeal to superior agency authority is a prerequisite to judicial review when expressly required by statute. Likewise, the Ninth Circuit has ruled that “when exhaustion is statutorily mandated, the exhaustion requirement is jurisdictional and the district court must dismiss the action.” *Eluska v. Andrus*.<sup>16</sup> Section 902 of ANILCA is such a statute requiring exhaustion of administrative appeal rights before a party can seek federal court review of agency action. Section 902, codified at 43 U.S.C. § 1632(a), mandates, before suit is brought challenging decisions made by the Department of the Interior under ANCSA, **“Provided, That the party seeking such review shall first exhaust any administrative appeal rights.”** (emphasis added)

Stratman did not first exhaust his administrative appeal rights as required by Section 902 before filing suit. He filed suit on November 29, 2002, prematurely, without having appealed the IBLA panel ruling to the Secretary. Subject matter jurisdiction is lacking over the suit he filed in 2002 without having exhausted his administrative remedies.

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<sup>15</sup> 509 U.S. 137 (1993).

<sup>16</sup> 587 F.2d 996, 999 (9<sup>th</sup> Cir. 1978).

3. **Subsequent developments do not vest a federal court with subject matter jurisdiction which was absent when the suit was filed**

The above discussion of 5 U.S.C. § 704, 43 U.S.C. § 1632(a), and 43 CFR 2651.2(a)(5) demonstrates that subject matter jurisdiction was absent over Mr. Stratman's 2002 suit when he filed it on December 2, 2002 because (i) the suit impermissibly sought to challenge non-final agency action; and (ii) the petitioner failed first to exhaust administrative remedies by appealing the IBLA panel ruling to the Secretary of the Interior and awaiting the Secretary's decision.

Subject matter jurisdiction having been lacking when the suit challenging non-final agency action was filed in 2002, later developments, such as the December 20, 2006 ruling by Secretary Kempthorne [Appendix C], referenced in Mr. Stratman's Third Amended Complaint filed on February 26, 2007 [ER 137] did not vest the federal courts with subject matter jurisdiction which was absent on the date suit was filed. Subject matter jurisdiction is determined as of the date suit is filed; it is not contingent upon future developments. The suit was filed when there was no "final agency action," at a time when the claimant had not yet exhausted appeals from the IBLA panel to the "superior agency authority," the Secretary of the Interior. Petitioner could not amend his way into federal subject matter jurisdiction which was non-existent at the outset:

"Subject matter jurisdiction must exist as of the time the action is commenced. See *Mullan v. Torrance*, 22 U.S. (9 Wheat) 537, 538, 6 L.Ed. 154 (1824) (jurisdiction 'depends upon the state of things at the time of the action brought'); *Nuclear Eng'g Co. v. Scott*, 660 F.2d 241, 248 (7<sup>th</sup> Cir.1981) ('Jurisdictional questions are answered by reference to the time of the filing of an action....'), *cert. denied*, 455 U.S. 933, 102 S.Ct. 1622, 71 L.Ed.2d 855 (1982); *Mobil Oil Corp. v. Kelley*, 493 F.2d 784, 786 (5<sup>th</sup> Cir.) ('jurisdiction is determined at the outset of the suit'), *cert. denied*, 419 U.S. 1022, 95 S.Ct. 498, 42. L.Ed.2d 296 (1974). If jurisdiction is lacking at the outset, the district court has 'no power to do anything with the case except dismiss.' 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3844, at 332 (1986). . . . **If jurisdiction was lacking, then the court's various orders, including that granting leave to amend the complaint, were nullities.**"

*Morongo Band of Mission Indians v. California State Board of Equalization*, 858 F.2d 1376 (9<sup>th</sup> Cir.1988), *cert denied*, 488 U.S. 1006 (1989) (emphasis added).

As applied to this case, no federal subject matter jurisdiction existed to entertain this suit when filed in 2002 because the suit sought to challenge non-final agency action, and the petitioner had failed to exhaust administrative appeal rights as required by 43 U.S.C. § 1632(a). Consequently, the district court had no discretion to do anything other than dismiss the suit. Petitioner's third amended complaint [ER 137], purporting to challenge the 2006 ruling by Secretary Kempthorne, is an absolute nullity.

Petitioner should have waited until after the Secretary ruled to file suit. But having chosen to file suit challenging non-final agency action, and then been notified in writing by Leisnoi, Inc. of the absence of subject matter jurisdiction over the premature suit, the Petitioner, had he been prudent, should at the very least have filed a new suit in 2006 after Secretary Kempthorne ruled, and then moved to consolidate the two cases, rather than merely amending his complaint in the 2002 suit. But he failed to take the prudent course of action. Instead, he tried to amend his way into subject matter jurisdiction which had been absent when he first filed his case. Subject matter jurisdiction was absent at the outset, so the district court had "no power to do anything, other than to dismiss the action." *Morongo Band of Mission Indians*.<sup>17</sup> Petitioner's filing of an amended complaint [ER 137] on February 16, 2007, purporting to challenge the Secretary's ruling, is an absolute nullity because "a district court is

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<sup>17</sup> 858 F.2d at 1380.

powerless to grant leave to amend when it lacks jurisdiction over the original complaint.”<sup>18</sup>

It is too late now for Mr. Stratman to correct his nonfeasance by belatedly filing suit challenging final agency action consisting of Secretary of the Interior Kempthorne’s December 20, 2006 decision, *In re Appeal of Leisnoi, Inc. from Decision of Interior Board of Land Appeals* [Appendix C], because the statute of limitations in which to do so has lapsed. Ironically, the passing of the statute of limitations occurred just two weeks before Stratman filed the instant January 5, 2009 petition. The statute lapsed on December 20, 2008, the two-year anniversary of Secretary Kempthorne’s December 20, 2006 ruling in favor of Woody Island. See, ANILCA § 902 “[A] decision of the Secretary under this title or the Alaska Native Claims Settlement Act shall not be subject to judicial review unless such action is initiated before a court of competent jurisdiction within two years after the day the Secretary’s decision becomes final....”

*Certiorari* should be denied because subject matter jurisdiction was lacking on date suit in this case was first filed, and did not become vested by amendment addressing events transpiring four years after Petitioner prematurely filed suit.

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<sup>18</sup> *Id.* at 1381.

## **II. THE 2002 SUIT WAS FILED TOO LATE TO CHALLENGE SECRETARY MORTON'S 1974 ELIGIBILITY DECISION.**

Subject matter jurisdiction is absent in this 2002 suit that Petitioner has tried to use as a vehicle for challenging Secretary Morton's 1974 eligibility decision, because the two year statute of limitations in 43 U.S.C. § 1632(a) for contesting that decision had lapsed before Petitioner filed this suit. Accordingly, it would be a moot point for this Court to decide whether Congress later ratified that decision.

At the Ninth Circuit, Stratman attempted to portray his appeal as being a challenge to the 1974 decision by Secretary Morton **to certify**: "This is an appeal of the District Court's dismissal of Appellant Omar Stratman's ('Stratman') APA action against the Secretary of Interior, challenging the Secretary's **decision to certify** Appellee Leisnoi, Inc. ('Leisnoi') as an eligible Native Village...."<sup>19</sup> He repeats this theme in the petition, claiming "the Secretary's original 1974 determination of Leisnoi's eligibility still remains in effect – and it will remain in effect forever unless it is vacated in this case." But the "decision to certify" made decades ago by Secretary Morton [ER 304], cannot be "vacated in this case" because that 1974 Secretarial decision is not subject to judicial review by any federal court, including the Supreme

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<sup>19</sup> Appellant's Brief at page 2.

Court. The statute of limitations to challenge the September 9, 1974 decision has lapsed.

ANILCA section 902 imposes a two-year statute of limitations for suits challenging ANCSA decisions made by the Secretary of the Interior, mandating that such decisions “**shall not be subject to judicial review unless** such action is initiated before a court of competent jurisdiction within two years after the day the Secretary’s decision becomes final or the date of enactment of this Act [enacted December 2, 1980].”<sup>20</sup> (emphasis added) Petitioner cannot use his 2002 case as a vehicle for challenging Secretary Morton’s 1974 eligibility decision because the Petitioner did not file this suit within two years after the day of the September 9, 1974 decision or within two years after the effective date of ANILCA, December 2, 1980.

The 1976 suit, Civil Action No. A76-132 [ER 236], was Stratman’s effort to challenge the 1974 decision that the Native Village of Woody Island meets the eligibility requirements for ANCSA benefits. That suit was timely brought within two years of the Department of the Interior’s 1974 village eligibility certification.

But this 2002 case which is the subject of the petition for *certiorari* is not the 1976 suit. The 1976 suit ended in a Final Judgment on November 21, 1995 [ER 230]. Petitioner took no appeal from that judgment. He should have appealed from it, demanding that a mere stay order be entered in its

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<sup>20</sup> 43 U.S.C. § 1632(a).

place, if he wanted to preserve whatever right he had to challenge the 1974 village eligibility decision, because "The rule in [the Ninth Circuit] is that where a court suspends proceedings in order to give preliminary deference to an independent adjudicating body but further judicial proceedings are contemplated, then jurisdiction should be retained by a stay of proceedings, not relinquished by a dismissal...." *U.S. v. Henri*, 828 F.2d 526, 528 (9<sup>th</sup> Cir. 1987).

This rule enables claimants to protect themselves against the lapsing of the statute of limitations during the pendency of agency review by appealing a judgment of dismissal in favor of a mere stay. The rule stems from and applies the doctrine announced by this Court in *Carnation Co. v. Pacific Westbound Conference*,<sup>21</sup> that where a statute of limitations may lapse while a case is referred for agency action, a federal court should stay, rather than dismiss, the suit: "Such claims are subject to the Statute of Limitations and are likely to be barred by the time the Commission acts. Therefore, we believe that the Court of Appeals should have stayed the action instead of dismissing it."<sup>22</sup>

Had he appealed per *Carnation Co.* and *Henri*, and obtained an order reversing the judgment [ER 230] in favor of a stay pending further administrative consideration, then, upon

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<sup>21</sup> 383 U.S. 213 (1966).

<sup>22</sup> 383 U.S. at 223.

completion of the agency's review, Stratman could simply have re-activated his 1976 suit. He might thereby have obtained judicial review of the 1974 eligibility decision. But Stratman failed to act prudently.<sup>23</sup>

Congress declared in 43 U.S.C. § 1601 that the ANCSA settlement should be "accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation..." (emphasis added) And in 43 U.S.C. § 1632(a), it mandated that ANCSA rulings "shall not be subject to judicial review" unless brought within two years of the Secretarial decision or the December 2, 1980 effective date of ANILCA. The Supreme Court should not disregard those directives by granting *certiorari* in a 2002 case

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<sup>23</sup> The Ninth Circuit addressed the legal consequences that flow from Stratman's imprudent failure to have appealed the Final Judgment that terminated his 1976 case. The appellate court dismissed an appeal Stratman had taken from a denial of his motion for preliminary injunction in the 1976 case, holding that the interlocutory appeal was mooted by entry of Final Judgment in the 1976 suit. *Stratman v. Babbitt*, No. 95-35376 (Order of April 19, 1996) [ER 391]. Despite learning from the appellate court of the jurisdictional-stripping effect flowing from entry of the Final Judgment, Stratman failed timely to move for Rule 60(b) relief. By opting neither to appeal from the judgment nor to move for relief under Rule 60(b), Petitioner deliberately disabled the safety mechanism this Court and the Ninth Circuit had put in place in *Carnation Co.* and *Henri*, thereby allowing the statute of limitations to expire and preclude judicial review of the 1974 agency decision.

being impermissibly used to try to upset a 1974 eligibility determination.

### **III. STRATMAN LACKS ADMINISTRATIVE STANDING TO APPEAL WOODY ISLAND'S ELIGIBILITY**

Who is this itinerant berry-picker that comes before this Court seeking *certiorari*, and what interest does he have in Woody Island's certification? His petition for *certiorari* does not reference any evidence in the record upon which this Court could find the petitioner has standing. The ANCAB held that Stratman does not have a claim of property interest sufficient to vest him with administrative standing to maintain an appeal.<sup>24</sup> That unappealed ANCAB ruling has lurked as a skeleton in Stratman's closet, and now has emerged to haunt him.

When Petitioner appeared before the Department of the Interior, in August 1998 at administrative hearings conducted before Administrative Law Judge Harvey Sweitzer, Petitioner conceded he holds no "property interest" affected by Woody Island's certification [ER 406].<sup>25</sup>

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<sup>24</sup> *In the Matter of Leisnoi, Inc., Appeal of Omar Stratman*, ANCAB No. L77-4C, March 24, 1978 Decision and Order of Dismissal [ER 323].

<sup>25</sup> Stratman testified he has no property interest in land that would be affected by the eligibility determination. Transcript of August 4, 1998 proceedings, testimony of Omar Stratman at p. 724 ("I don't believe I have a property interest in it, no."); ("He doesn't have a claim of a property interest in this case.") [admission by Petitioner's counsel,

Stratman did not establish any “legally cognizable interest” of his that is “adversely affected” by the certification decision. He failed to establish administrative standing to ask the IBLA to overturn the BIA’s certification decision.

Administrative standing is distinct from judicial standing.<sup>26</sup> Allowing Omar Stratman, whose grazing lease on Leisnoi’s land has expired [ER 262], to challenge Woody Island’s eligibility would not assist the Department of the Interior in the fulfillment of its functions because Stratman lacks any property interest in Leisnoi’s land, and holds no legally cognizable interest affected by whether Woody Island retains its certification.

Administrative standing merely to protest<sup>27</sup> village eligibility is much broader than the administrative standing that is required to appeal from an eligibility ruling. The standing issue Leisnoi raises in opposing *certiorari*, and which it

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attorney Michael Schneider], transcript at pp. 722-723 [ER 394-421].

<sup>26</sup> *High Desert Multiple-Use Coalition, Inc.*, 116 IBLA 47 (1990) (“We, however, have rejected the notion that judicial determinations of standing control questions of administrative standing... [S]tanding before the agency should rest on an inquiry whether allowing standing to a party will assist the agency in fulfillment of its functions.”). See also *In re Pacific Coast Molybdenum Co.*, 75 IBLA 16 (1983) [ER 334].

<sup>27</sup> Title 43 CFR § 2651.2 broadly allows “Any interested party” to “protest a proposed decision as to the eligibility of a village.” (emphasis added).

raised in the courts below, is not whether Omar Stratman had a right to file an initial protest to the eligibility of the Native Village of Woody Island. Rather, the question is whether Stratman had standing to pursue an administrative appeal to the IBLA, challenging the Bureau of Indian Affairs' certification of Woody Island as being eligible for ANCSA benefits.

Once a decision has been made certifying a village as eligible for ANCSA benefits, standing to pursue an administrative appeal therefrom is narrow. To have standing to appeal Woody Island's certification, Stratman either had to prove under 43 CFR § 4.410 subsection (a)<sup>28</sup> that he was "adversely affected" by the decision,<sup>29</sup> or show

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<sup>28</sup> "Any party to a case **who is adversely affected** by a decision of an officer of the Bureau of Land Management or of an administrative law judge shall have a right to appeal to the Board..." 43 CFR § 4.410(a). The term "adversely affected" is defined in subsection (d): "A party to a case is adversely affected, as set forth in paragraph (a) of this section, when that party has **a legally cognizable interest, and the decision on appeal has caused or is substantially likely to cause injury to that interest.**" 43 CFR § 4.410(d).

<sup>29</sup> The Administrative Procedures Act likewise requires that a protestant appealing to court prove he has been adversely affected in order to be permitted to challenge the agency determination. Sovereign immunity is waived only for suits brought by persons who are "adversely affected or aggrieved by agency action ...." 5 U.S.C. § 702. Stratman has not shown he was adversely affected by the agency action, so he has no viable APA claim.

under subsection (e)<sup>30</sup> that he holds a “property interest in land affected by the decision.” The issue of which particular subsection of 43 CFR § 4.410 governs Stratman’s attempted belated administrative appeal from the village eligibility determination is purely academic, because he does not meet either test. He failed in his petition for *certiorari* to show that he is “adversely affected” by the eligibility determination,<sup>31</sup> and has even sworn under oath [ER 394-421] that he holds no “property interest” in Leisnoi’s land. His former grazing lease on Leisnoi’s land [ER 259] expired in 2001, and Appellant has not shown he presently has a cognizable interest in the Department of the Interior’s certification of the Native Village of Woody Island.

#### **IV. STRATMAN LACKS JUDICIAL STANDING TO CHALLENGE WOODY ISLAND’S CERTIFICATION**

The Ninth Circuit seems to have assumed, in *Stratman v. Watt*, 656 F.2d 1321 (9<sup>th</sup> Cir.1981),

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<sup>30</sup> “For decisions rendered by Departmental officials relating to land selections under the Alaska Native Claims Settlement Act, as amended, any party **who claims a property interest in land affected by the decision**, an agency of the Federal Government or a regional corporation shall have a right to appeal to the Board.” 43 CFR § 4.410(e).

<sup>31</sup> At the administrative proceedings [ER 394-421], Stratman never articulated any “legally cognizable interest” or explained how the eligibility determination “has caused or is substantially likely to cause injury to that interest.” 43 CFR § 4.410(d).

that Stratman made recreational use of Leisnoi's land that would support a finding of judicial standing in his 1976 suit. But the court cited no evidence in the record in that case, and Leisnoi is unaware of any evidence in the record in this case to support such an assumption. Stratman did not offer any proof of recreational use by him of Leisnoi's land, either at the administrative hearings, in district court, in his appellant's brief, or in his petition for *certiorari*. He has not proven judicial standing.

#### **V. THE DOCTRINE OF ADMINISTRATIVE FINALITY BARS RELITIGATION OF STRATMAN'S CLAIM CHALLENGING WOODY ISLAND'S ELIGIBILITY FOR ANCSA BENEFITS**

*Certiorari* should be denied also because the doctrine of administrative finality<sup>32</sup> bars Stratman from relitigating claims challenging Woody Island's eligibility. Petitioner already litigated those claims at the Alaska Native Claims Appeal Board, lost, then failed to appeal to federal court. *In the Matter of Leisnoi, Inc., Appeal of Omar Stratman*, ANCAB No. LS 77-4C (March 24, 1978) [ER 318].

Stratman had used his ANCAB case to challenge both village eligibility and land

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<sup>32</sup> The doctrine of administrative finality bars re-litigation in a subsequent case of claims brought in an earlier action which could have been subjected to appellate review. *Keith Rush d/b/a Rush's Lakeview Ranch*, 125 IBLA 346 (1993) [ER 370]; *Village of South Naknek*, 85 IBLA 74 (February 11, 1985) [ER 345].

entitlements. In his April 26, 1977 Statement of Reasons for Appeal [ER 316-17], Stratman argued that "the number of Native residents for Leisnoi, Inc. shown to be eligible for the purposes of computing entitlements to Federal lands is erroneous. Information and evidence in the possession of the appellants indicate that the number of natives residing in the village upon the date specified in the Alaska Native Claims Settlement Act was zero.... [T]here were no Native residents as required by the statute to provide eligibility." (emphasis added)

By contending there were "no Native residents .. to provide eligibility", Stratman was claiming the Native Village of Woody Island is ineligible for ANCSA benefits.<sup>33</sup> This alleged lack

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<sup>33</sup> Petitioner was not the only one who used a land selection case as a vehicle to mount a village eligibility challenge against Leisnoi. The Kodiak-Aleutian Chapter, Alaska Conservation Society used the same tactic, and also failed. *In the Matter of Leisnoi, Inc., Appeal of Kodiak-Aleutian Chapter, Alaska Conservation Society*, ANCAB No. LS 77-11, Order of Dismissal dated March 31, 1978 [ER 325]. That case was decided just one week after the ANCAB ruled against Omar Stratman. [ER 318]. The ANCAB therein agreed with Leisnoi and the Bureau of Indian Affairs that, although labeled as a land selection challenge, the challenge in fact went to village eligibility:

"In addition, the Board agrees with contentions of Leisnoi and the BIA that the present appeal constitutes an attack on the eligibility of Leisnoi, Inc. for land benefits under ANCSA... under the guise of an entitlement appeal under the theory that the village is not entitled to land under the Act because it is not in fact eligible for benefits as a village." [ER 329]

of a sufficient number of Natives on Woody Island is the same claim Stratman has sought to relitigate in this 2002 suit, which he characterizes as an Administrative Procedures Act claim. But the doctrine of administrative finality bars relitigation of this claim because Stratman took no appeal from the ANCAB's March 24, 1978 Final Order of Dismissal [ER 318].

Stratman's failure to appeal from the administrative decision "renders that decision and the findings contained therein final for the Department and precludes a party from later challenging it..." *CCCo.*, 127 IBLA 291, 293-94 (1993). [ER 375] (emphasis added) The ANCAB, rejecting Stratman's arguments, wrote that "Leisnoi has been **found to be eligible** as a village under §11 of ANCSA... [A] determination of eligibility is a finding that such viilage had at least a minimum Native population of 25 on the 1970 census enumeration date." [ER 322] *Certiorari* should be denied because that finding of eligibility is final, and the doctrine of administrative finality precludes Stratman from relitigating it in this 2002 case.

## **VI. COLLATERAL ESTOPPEL BARS RELITIGATION OF THE ISSUE OF WOODY ISLAND MEETING THE VILLAGE ELIGIBILITY REQUIREMENTS FOR ANCSA BENEFITS**

Another reason *certiorari* is inappropriate is that collateral estoppel precludes Stratman from re-litigating village eligibility issues decided on the

merits in favor of Leisnoi by the Department of the Interior, Bureau of Indian Affairs, Area Director on February 8, 1974 in the *Final Administrative Determination Concerning the Eligibility of Woody Island as a Native Village for Purposes of ANCSA*, [ER 278] published in the Federal Register on February 21, 1974 [ER 282] affirmed by the Alaska Native Claims Appeal Board, *In re Woody Island*, ANCAB No. VE74-65 (August 28, 1974) [ER 303], approved by Secretary Morton on September 9, 1974. [ER 304]

Stratman was in privity with the parties who unsuccessfully challenged village eligibility in *In re Woody Island*, so he is collaterally estopped from re-litigating that same issue herein thirty years later. A commonality of interests and adequate representation are all that is required for privity. *Bayone v. Baca*, 2005 U.S.App. LEXIS 7950 (9<sup>th</sup> Cir.2005); *Shaw v. Hahn*, 56 F.3d 1128 (9<sup>th</sup> Cir.1995).

#### (a) Commonality of interests

Although Stratman himself was not party to the challenge to the certification of the Native Village of Woody Island brought by Phillip Holdsworth and the Alaska Wildlife and Sportsmen's Council, Inc., he shares a commonality of interests with them. He was in privity with these earlier protestants with whom he was "closely aligned in interests" and with whom "there is sufficient commonality of interests." See, *Shaw v. Hahn*, 56 F.3d at 1131. Both the earlier protestants and the protestant in the instant case had the same objective: to block the certification of

the Native Village of Woody Island. Both sets of protestants opposed Woody Island being deemed eligible for benefits under ANCSA, and raised similar arguments in seeking to achieve their common interest.

(b) Adequacy of representation

Protestants Phillip Holdsworth and the Sportsmen's Council were adequately represented by attorney James Clark of the well-respected Alaska firm then-known as Robertson, Monagle, Eastaugh & Bradley. He filed their protest to the eligibility of Woody Island on January 21, 1974 [ER 264]; and timely appealed [ER 284] to the ANCAB from the February 8, 1974 final administrative determination [ER 278] that Woody Island qualifies for ANCSA benefits.

Petitioner Stratman is collaterally estopped from relitigating the issue of Woody Island's eligibility for ANCSA benefits.

**VII. MISCELLANEOUS REASONS FOR DENYING CERTIORARI**

In addition to the lack of subject matter jurisdiction, and the arguments against *certiorari* set forth in the oppositions of the United States and of Koniag, Inc., Leisnoi advises this Court of the following additional reasons it should not issue a writ of *certiorari*.

Petitioner's argument that *certiorari* is needed to correct what he labels as "fraud" is disingenuous because the Petitioner formally

abandoned all allegations of fraud on January 5, 1977 [ER 194].

Petitioner's argument that *certiorari* is necessary to prevent Leisnoi from keeping land the United States patented to it many years ago lacks merit because the land patents have been validated by the passage of more than six years since their issuance, per 43 U.S.C. § 1166, and the United States Court of Appeals for the Ninth Circuit quieted title in favor of Leisnoi. *Leisnoi, Inc. v. United States*, 267 F.3d 1019 (9<sup>th</sup> Cir. 2001); *Leisnoi, Inc. v. United States, Omar Stratman, Applicant in Intervention*, 313 F.3d 1181 (9<sup>th</sup> Cir. 2002).<sup>34</sup> Petitioner failed to seek *certiorari* from this Court from the judgment quieting title in favor of Leisnoi. Petitioner's claim that title is at issue in this case, although the Ninth Circuit declared otherwise in quieting title in favor of Leisnoi in 2002,<sup>35</sup> renders the instant petition frivolous within the meaning of Supreme Court Rule 42, warrants a stern rebuke from this Court, and entitles Respondent to damages and costs.

The ruling by the Secretary of the Interior was correct, and is entitled to due deference. Resolution of an ambiguity in a statute by an agency head charged with the statute's

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<sup>34</sup> Stratman's argument that Leisnoi is not entitled its ANCSA conveyances is also inconsistent with the ANCAB ruling approving Leisnoi's ANCSA land selections, from which ruling Stratman took no appeal to federal court. *Appeal of Omar Stratman*, ANCAB No. LS 77-4C [ER 318].

<sup>35</sup> *Leisnoi, Inc. v. United States, Omar Stratman, Applicant in Intervention*, 313 F.3d 1181 (9<sup>th</sup> Cir. 2002).

administration,<sup>36</sup> in the context of a formal agency adjudication, such as in this case, triggers mandatory deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) and *United States v. Mead Corp.*, 533 U.S. 218, 229-230 (2001). Petitioner himself previously argued, successfully, to the Ninth

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<sup>36</sup> The Secretary is charged with administration of ANCSA and ANILCA. The Secretary would be the one who would have to re-open enrollment to find villages to accommodate the diaspora of displaced Woody Islanders if their village were decertified: “[Upon decertification], the Secretary shall, in accordance with the criteria for residence applied in the final determination of eligibility, redetermine the place of residence on April 1, 1970 for all purposes under the Settlement Act”. Section 1(c) of the Act of Jan. 2, 1976, P.L. 94-204, 89 Stat. 1145. Stratman has never challenged the Native blood quantum of individual Leisnoi shareholders. The Native Woody Islanders all have sufficient blood quantum to be entitled the ANCSA benefits. For example, Angeline Maliknak (1902-1972), one of the matriarchs of Woody Island, lived in the village for more than 50 years; yet, the harsh recommendation of the administrative law judge was that she be stripped of her Woody Island residency simply because she had sought nursing home care in Seward shortly before she died [ER 47]. If the Native Village of Woody Island were decertified, as Stratman has sought, then the Secretary would have to determine into what village and region Angeline should be re-enrolled. Angeline cannot decide for herself, since she is no longer alive. Other villages might not want the value of their respective shares diluted by adding new members. This process, and resulting litigation, would play out with more than 300 shareholders having to re-enroll more than thirty years after ANCSA was implemented. The Secretary would have to grapple with immense logistical difficulties if Woody Island were decertified. He is charged with implementing ANCSA and ANILCA, and his determination is entitled to substantial deference.

Circuit that an interpretation of ANCSA by the Secretary of the Interior is entitled to substantial deference. *Leisnoi, Inc. v. Stratman*, 154 F.3d 1062, 1068, 1072 (9<sup>th</sup> Cir.1998).

A misconception that permeates, even dominates, the petition for *certiorari*, is the incorrect assumption that the doctrine of implied repeal somehow applies. The petition leaves the reader bewildered, wondering "what is all this talk about implied repeal?" Neither Leisnoi, Inc., Koniag, Inc., nor the federal defendant has ever claimed that ANILCA impliedly repealed ANCSA. Rather, ANILCA ratified Secretary Morton's determination that Woody Island meets the ANCSA requirements for village eligibility.

Stratman himself, when presenting the statement of issues upon remand to the Department of the Interior in his January 25, 1996 Report Regarding Issues and Procedures on Remand [ER 381], referred to the ANILCA issue as one of ratification, not repeal. He phrased the issue as follows:

"Does § 1427 (Afognak Island Joint Venture Provision) of the Alaska National Interest Lands Conservation Act of 1980 ('ANILCA'), Pub. L. 96-487, 94 Stat. 2371, **ratify** Leisnoi's existence as an eligible ANCSA village and thus preclude Mr. Stratman's further attack on Leisnoi's eligibility? (emphasis added)

Stratman's Report Regarding Issues and Procedures on Remand at p. 7 [ER 387].

Likewise, almost three years later, in his December 7, 1998 Post-Hearing Brief filed with the Department of the Interior [ER 422], Stratman again referenced the issue as being one of ratification, not repeal. Petitioner's effort now to recharacterize the issue rings hollow and does not militate in favor of *certiorari*.

Whether or not the Secretary of the Interior was initially correct or authorized in making his eligibility determination is irrelevant, and does not militate in favor of the Court granting *certiorari* inasmuch as Congress has plenary authority under the property clause of the United States Constitution to dispose of public lands as it sees fit. *Van Brocklin v. Anderson*, 117 U.S. 151, 165 (1886); *Maxwell Land Grant Case*, 121 U.S. 325 (1887); *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

If the Secretary of the Interior had erroneously certified the Native Village of Woody Island, as Stratman mistakenly contends, then Congress nonetheless had the authority to ratify the actions of the government official in certifying Woody Island as being eligible, even if his act was unauthorized or incorrect at the time it was made. *Swayne & Hoyt v. United States*, 300 U.S. 297 (1936); *Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139 (1936). It no longer matters whether Woody Island met the regulatory test for benefits under ANCSA, since Congress enacted ANILCA recognizing Leisnoi, Inc. to be a Koniag Village

Deficiency Corporation that has a “right to conveyance” under ANCSA.

The Native Village of Woody Island properly met the village eligibility test, and was duly certified more than thirty years ago.<sup>37</sup> Congress ratified the Secretary’s determination in 1980 by enacting ANILCA, Pub. L. 96-487, 94 Stat. 2371, which specifically confirmed that Leisnoi, Inc. has a “right” to ANCSA conveyances and is “entitled” to those benefits. There is no conflict amongst the circuits, or compelling reason for this Court to disturb those determinations and require the Secretary to reopen settled village enrollment decades after the process was completed. This Court should not grant *certiorari* in 2009 to review

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<sup>37</sup> The Native Village of Woody Island has played a colorful and well-documented role in the history of Alaska. For many years, it supplied fresh water ice from its lakes to the city of San Francisco. Native Woody Islanders cut ice and packed it in sawdust so that it could be shipped on oceangoing vessels from Woody Island to San Francisco, where ice was needed because of the population explosion generated by the 1849 California Gold Rush [Book 14, Chaffin, Yule, Alaska's Konyag Country]. In 1867, the United States and Russia signed a treaty for the purchase by the United States of Russian America (Alaska). The price was initially set at \$7,000,000.00. But an additional \$200,000.00 was added to the purchase price in the few days prior to the actual signing as compensation to the Russian American Company for the loss of its exclusive charter to operate in Alaska producing and trading ice and furs. This came about largely because of the Russian American Company operations on Woody Island [Document 409, Speech of Hon. Charles Sumner, of Massachusetts, on the Cession of Russian America to the United States].

a 1974 village eligibility decision; instead, the Court should heed Congress' admonition at 43 U.S.C. § 1601 that the ANCSA settlement should be accomplished "rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation..." Requiring the Woody Islanders to relitigate issues already decided in favor of their small Native Village decades ago would further deplete the assets of the Native Village corporation, depriving it of the means Congress had envisioned for it to meet the real economic and social needs of its Native shareholders.

WHEREFORE, subject matter jurisdiction being absent, and for the miscellaneous reasons set forth above, as well as those arguments articulated in oppositions of the other Respondents, this Court should DENY the petition for *certiorari*.

Respectfully submitted,

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